

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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|--|---|----------------------|
| ALVIN BALDUS, CARLENE BECHEN, ELVIRA |) | |
| BUMPUS, RONALD BIENDSEIL, LESLIE W. |) | |
| DAVIS, III, BRETT ECKSTEIN, GLORIA |) | |
| ROGERS, RICHARD KRESBACH, ROCHELLE |) | |
| MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE |) | |
| SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS |) | |
| THYSSEN, CINDY BARBERA, RON BOONE, VERA |) | |
| BOONE, EVANJELINA CLEERMAN, SHEILA |) | |
| COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, |) | Case No. 11-CV-562 |
| RICHARD LANGE, and GLADYS MANZANET, |) | JPS-DPW-RMD |
| |) | |
| Plaintiffs, |) | |
| |) | Milwaukee, Wisconsin |
| TAMMY BALDWIN, GWENDOLYNNE MOORE and |) | |
| RONALD KIND, |) | February 23, 2012 |
| |) | 1:45 p.m. |
| Intervenor-Plaintiffs, |) | |
| |) | VOLUME V |
| v. |) | P.M. SESSION |
| |) | |
| Members of the Wisconsin Government |) | |
| Accountability Board, each only in his |) | |
| official capacity; MICHAEL BRENNAN, |) | |
| DAVID DEININGER, GERALD NICHOL, THOMAS |) | |
| CANE, THOMAS BARLAND, and TIMOTHY VOCKE, |) | |
| and KEVIN KENNEDY, Director and General |) | |
| Counsel for the Wisconsin Government |) | |
| Accountability Board, |) | |
| |) | |
| Defendants, |) | |
| |) | |
| (caption continued on next page) |) | |

TRANSCRIPT OF COURT TRIAL

BEFORE DIANE WOOD, CIRCUIT JUDGE; ROBERT DOW, JR., DISTRICT
JUDGE, and J.P. STADTMUELLER, DISTRICT JUDGE

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Proceedings recorded by computerized stenography, transcript
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F. JAMES SENSENBRENNER, JR., THOMAS E.
 PETRI, PAUL D. RYAN, JR., REID J.
 RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIRO
 VARA, OLGA VARA, JOSE PEREZ, and
 ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government
 Accountability Board, each only in his
 official capacity; MICHAEL BRENNAN,
 DAVID DEININGER, GERALD NICHOL, THOMAS
 CANE, THOMAS BARLAND, and TIMOTHY VOCKE,
 and KEVIN KENNEDY, Director and General
 Counsel for the Wisconsin Government
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Defendants.

Case No. 11-CV-1011
 JPS-DPW-RMD

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TRANSCRIPT OF PROCEEDINGS

JUDGE STADTMUELLER: And let the record reflect that we've reconvened once again in the bench trial of Baldus, et al., versus Brennan, et al. And Mr. Poland, you may continue with your questions, and the witness, Dr. Mayer, you may resume the witness stand.

MR. POLAND: Your Honor, we do actually have a scheduling issue. I've conferred with counsel for the Government Accountability Board. We have two witnesses who have -- are a little bit more limited in their time that they're available for trial. We have both Representative Barca and then also Mr. Kennedy from the Government Accountability Board, both of whom would need to go on the stand today. After conferring with counsel for the Government Accountability Board, what we'd like to do with the Court's permission would be to interrupt Dr. Mayer's testimony to be able to get the testimony of those two gentlemen on today.

JUDGE STADTMUELLER: All right. That's certainly acceptable.

MR. POLAND: Thank you, your Honor.

JUDGE STADTMUELLER: I think it's also appropriate for the Court to make a couple of additional comments with reference to objections about matters that are either beyond the scope of direct or matters pertaining to things that might not have been as thoroughly addressed as counsel may believe in

1 the context of the adversarial process in the crucible of the
2 courtroom to suggest that while it is certainly appropriate for
3 all of you to make objections as you deem appropriate, I think
4 it goes without saying that this is unlike a jury trial, a
5 bench trial, and to the extent that there be matters addressed
6 that counsel believe were not vetted during the pretrial
7 process, you're certainly free to note those for the record,
8 and to the extent that the Court in the final analysis ought
9 not consider them, rest assured, we will not. So with that
10 thought, you may proceed with your next witness out of order.

11 MR. POLAND: Thank you, your Honor, and we'd like to
12 call Mr. Kennedy. But before we do that, there is a pending
13 motion in limine that the Government Accountability Board has
14 filed to -- it goes to the scope of Mr. Kennedy's testimony.
15 I don't know if your Honors would like to hear argument on
16 that.

17 JUDGE STADTMUELLER: Certainly.

18 MR. KELLY: Thank you, your Honor. We learned at the
19 beginning of this week that the plaintiffs intend to talk with
20 Mr. Kennedy about matters that are clearly outside the scope of
21 what this Court is supposed to be considering. We know that
22 because that's what they told us. In an e-mail exchange that
23 we had with them about the scope of Mr. Kennedy's testimony,
24 the plaintiffs' counsel admitted to us they didn't believe that
25 the evidence that he would testify to had any impact whatsoever

1 on the constitutionality of Acts 43 or 44. As a result, it
2 can't have any relevance to the proceedings here today. They
3 want to talk about implementation of the map, they want to talk
4 about some concerns about census data that have nothing to do
5 with anything that we're doing here today.

6 The significance of this further to this, to learning
7 this at a very late stage of the proceedings, is this was the
8 subject of a motion for protective order. And as the Court may
9 recall, that motion was withdrawn because we came to a
10 stipulated resolution of our concerns, and that resolution was
11 this. They would take Mr. Kennedy's deposition on these
12 topics. If they learned of anything that would affect the
13 constitutionality of Acts 43 or 44, they would be permitted to
14 amend their complaint, to add a new claim; they would be
15 permitted to amend their expert reports to opine on the topic;
16 and then we would have an opportunity to do the same.

17 The deadline came and went for amending their
18 complaint and they didn't. When they -- when they told us that
19 they nonetheless intended to talk about these things that were
20 part of this agreement that caused us our to withdraw our
21 motion for protective order, we inquired into what possible
22 significance it could have to the proceedings before this
23 Court, and at that point they admitted it has nothing to do
24 with the constitutionality of the acts. For whatever reason
25 they simply want to talk about it. In the limited time

1 available to us, Mr. Kennedy's full schedule, I don't think it
2 would be appropriate to use the Court's time to talk about
3 irrelevancies.

4 JUDGE WOOD: I have a question of clarification for
5 you, please. When you speak of the constitutionality of the
6 two acts, do you mean by that to include their consistency with
7 the Voting Rights Act?

8 MR. KELLY: I do.

9 JUDGE WOOD: So actually statutory and
10 constitutional.

11 MR. KELLY: Yes, your Honor.

12 JUDGE WOOD: Thank you.

13 MR. EARLE: I have a misbehaving computer.
14 I apologize.

15 JUDGE STADTMUELLER: All right. Mr. Poland, you want
16 to address Mr. Kelly's concerns?

17 MR. POLAND: I would, your Honor, and I would like to
18 go back also to the time that we first learned about the
19 undisclosed anomalies and we entered into our stipulation.
20 This was in January, and at that time -- this is a fairly
21 complex subject area and we were attempting to learn as much as
22 we could. We deposed someone from LTSB. We deposed another
23 technical person from the Government Accountability Board, and
24 then we took Mr. Kennedy's deposition as well to try to
25 understand what we were looking at.

1 At the time from the memorandums that were produced
2 in January, we were concerned about population deviations and
3 population movements. That's what was really the focus of what
4 we were looking at. And we had agreed, it was part of the
5 stipulation, we had agreed that if we saw something that was
6 going to affect those and require expert testimony or require
7 amendment to the complaint, that we would move the Court to do
8 that, for leave to do that, and that we would also seek leave
9 to supplement Dr. Mayer's expert report.

10 Now, what happened, what we found was that there
11 really was nothing that had substance as far as population
12 deviations as far as we could tell. There still may be. We
13 don't know, but they've convinced me, at least, that it would
14 be too hard to prove anyways, and so we're not making that a
15 part of this.

16 However, a couple of points that are very -- that are
17 of significant difference from what Mr. Kelly said. First of
18 all, we do have in our complaint, and this was in the
19 opposition to motion in limine that we did file. In our
20 complaint we did plead a claim for unconstitutionality of
21 Acts 43 and 44 because they -- let me find it. It's in count
22 two in paragraphs 39 and 40. As your Honors will see, Baldus
23 plaintiffs have pleaded the new districts are not bound by
24 county, precinct, town or ward lines already established by
25 local governments. Okay. That was a count in our complaint.

1 In other words, that the -- that the district lines do not
2 match up with the ward lines. That is pled as a count in our
3 complaint. It requires no amendment, requires no expert
4 testimony. It simply will require Mr. Kennedy's testimony and
5 that will be it. So it didn't require anything different.

6 Second of all, as to Mr. Kelly's claim that we had an
7 agreement that we wouldn't do anything that goes to the
8 constitutionality, you won't find that in an e-mail. Now, they
9 did attempt to bait me into it and say "So do we have an
10 understanding that you're not challenging the
11 constitutionality," and I said "No, no, that's not what we're
12 talking about." All right.

13 And I would note as well that Mr. Kelly's e-mail that he's
14 tendered to the Court left off my final e-mail as well that did
15 say where we intend to ask Mr. Kennedy about a host of other
16 subjects. So I also had conversations on the telephone with
17 Mr. Hodan as well. He was the one the weekend before. He was
18 the one that I had spoken with.

19 So in other words, Mr. Kennedy has very relevant testimony.
20 The Court's already seen documentary evidence that I will ask
21 Mr. Kennedy about. The Court has actually cited to it the
22 other day, and these are documents that Mr. Kennedy testified
23 to in his deposition as well. It's relevant, it's highly
24 relevant testimony and it goes directly to one of the claims
25 that's already pled. It doesn't require expert testimony. And

1 I'll sit down.

2 MR. KELLY: Let me just read from the e-mail from
3 Mr. Poland. February 14th, 10:46 a.m. Patrick -- addressing
4 my partner, Patrick Hodan -- we do not intend to challenge the
5 accuracy of the census data itself. As I said in our call
6 yesterday, although we do not intend to argue that the
7 anomalies issue caused legislative or congressional districts
8 to become unconstitutionally unbalanced or cause voters to move
9 districts, he doesn't want to talk about it anyway.

10 Well, the only issue about before this Court is
11 not -- is the constitutionality of Acts 43 and 44. It has
12 nothing to do with the implementation of the map. That's got
13 nothing to do with it. Mr. Kennedy will follow the law, of
14 course, and he will apply Acts 43 and 44 faithfully and
15 Mr. Poland said he has intention of questioning the
16 constitutionality of these acts based on that census data.

17 Now, based on that and in our prior agreement that we
18 would not pursue the motion for protective order because we
19 believed it was irrelevant, we believe it was unduly burdensome
20 to produce the information. We had a very explicit and
21 thorough understanding of what would cause us to withdraw our
22 motion for protective order, and it was -- and it was on these
23 terms. They would not be available to use the information
24 unless they amended their complaint to allege that this caused
25 it to be unconstitutional, and in such an event, they would be

1 able to amend their expert's report and then perhaps most
2 importantly, we would have an opportunity to seek expert
3 testimony on this.

4 Now, that date came and went and Mr. Poland was
5 silent. Now he wishes to sandbag us on yet another issue so he
6 can play in Court with issues that have not been explored and
7 not had an opportunity to be explored by the Government
8 Accountability Board. Now, we don't have the ability to put on
9 anyone to answer these allegations that Mr. Poland intends to
10 make and we've had no opportunity to get expert testimony on
11 it. We've had no opportunity to come to the Court to ask for
12 that protective order again once he breached our agreement.
13 Your Honor, I think this is -- this is shark practice at its
14 worst.

15 MR. SHRINER: Your Honor, may I be heard?

16 JUDGE STADTMUELLER: Well, when it comes to shark
17 practice and sandbagging, we could have a wonderful
18 conversation about those terms in other contexts, but today is
19 not that day. First of all, I think you and Mr. Poland are
20 talking past one another. First of all, as the complaint now
21 stands, the subject matter that Mr. Poland has raised was
22 raised in the complaint, it's been raised in the media and
23 obviously there are ongoing efforts to correct it. Whether it
24 rises to the level of constitutional proportions is perhaps a
25 whole 'nother question, but to suggest that Mr. Kennedy not be

1 permitted to have an inquiry put to him about the very subject
2 that he and the legislature have been trying to grapple with
3 is, frankly, as the Court commented the other day, a little bit
4 beyond the pale.

5 So the objection is overruled and the witness will be
6 permitted to have questions put to him on these subjects.
7 Again, in the end, what impact it will have on terms of the
8 Court's decision-making process is a whole 'nother subject, but
9 to suggest that there has been sandbagging is I think a bit too
10 much. You may call the witness.

11 MR. POLAND: Thank you, your Honor.

12 MR. SHRINER: Your Honor, I am sorry I didn't
13 interject earlier. I tried. I am troubled only by one thing
14 that Mr. Poland said, which is he read from a count of the
15 complaint suggesting that something about district lines not
16 coinciding with ward lines affects Act 44. We had an agreement
17 that Act 44 was going to be submitted on the evidence that the
18 parties have agreed to. The responsibility for negotiating
19 that was delegated to Mr. Olson and Mr. Hassett, and we've
20 reached that agreement and I think Mr. Poland told us he'd
21 signed off on that.

22 There's nothing about this subject in that agreement.
23 This material should not be admitted on Act 44. Mr. Olson and
24 Mr. Hassett have gone home on the representation that Act 44 is
25 coming in by stipulation rather than by live testimony. And

1 frankly, I have no idea how whether the ward lines coincide
2 with the district lines violates anything other than maybe
3 state law, which I think under the 11th amendment this Court
4 shouldn't be asked to enforce.

5 MR. POLAND: Your Honor, I think that I can address
6 Mr. Shriner's concern. I will limit my examination to Act 43
7 and not Act 44 issues.

8 MR. SHRINER: Thank you.

9 JUDGE STADTMUELLER: You may proceed.

10 MR. POLAND: Thank you, your Honor. The Baldus
11 plaintiffs call Kevin Kennedy.

12 KEVIN KENNEDY, PLAINTIFF WITNESS, DULY SWORN

13 THE CLERK: Mr. Kennedy, would you please state and
14 spell your full name for the court reporter.

15 THE WITNESS: My name is Kevin Kennedy, K-E-V-I-N,
16 middle initial J., Kennedy, K-E-N-N-E-D-Y.

17 DIRECT EXAMINATION

18 BY MR. POLAND:

19 Q Good afternoon, Mr. Kennedy.

20 A Hello.

21 Q Mr. Kennedy, what is your position with the Government
22 Accountability Board?

23 A I'm the board's director and general counsel.

24 Q Do you have law degree, sir?

25 A Yes, I do.

1 Q From where?

2 A University of Wisconsin.

3 Q Mr. Kennedy, what is the Government Accountability Board?

4 A The Government Accountability Board is an independent agency
5 of the state of Wisconsin. It's part of the executive branch.
6 It consists of six citizen members who are all former state
7 judges and it has a staff of 17 permanent people plus a number
8 of federally funded and temporary positions.

9 Q Mr. Kennedy, when was the Government Accountability Board
10 created?

11 A It was created in 2007.

12 Q And what is its role?

13 A Its role is to administer and enforce Wisconsin's laws
14 related to campaign finance, elections, ethics, lobbying and
15 certain contract disclosure.

16 Q Is the Government Accountability Board an independent,
17 nonpartisan agency?

18 A It is an independent agency. Its members and its staff are
19 required by law to be nonpartisan.

20 Q To whom, if anyone, does the Government Accountability Board
21 answer?

22 A Well, it's an independent agency, so it's not a cabinet
23 agency. Its members, while appointed by the governor and
24 confirmed by the Senate, act independently of them and the
25 staff reports directly to the board.

1 Q And the six members of the board are all judges; is that
2 correct?

3 A They're all former judges, yes.

4 Q So virtually every day you report to six retired judges; is
5 that correct?

6 A Six former judges, yes.

7 Q And if I missed it in your testimony before, how long have
8 you worked at the Government Accountability Board or its
9 predecessor agencies?

10 A I began with the State Elections Board on April 1st of 1979
11 as its staff counsel. I became its acting director in '82 and
12 its full-time director in August of 1983, and then when the
13 Government Accountability Board made its first hire, I was
14 hired in November of 2008.

15 Q Mr. Kennedy --

16 A I'm sorry, 2007.

17 Q I'm sorry. Didn't mean to interrupt. Did the Government
18 Accountability Board play a role at all -- I'm sorry. Strike
19 that question. You did work for the Government Accountability
20 Board then during the last redistricting cycle.

21 A I worked for the State Elections Board during the last
22 redistricting cycle.

23 Q The predecessor agency to GAB?

24 A One of those two, yes.

25 Q Did the GAB play a role at all in the redistricting process

1 before Acts 43 and 44 were enacted in August 2011?

2 A I'm sorry. Play a role at all?

3 Q In the redistricting process, the process actually of
4 creating the statutes that resulted in Acts 43 and 44?

5 A Not in creating the statutes, no.

6 Q Did anyone with the legislature consult with you or the
7 Government Accountability Board before settling on the process
8 by which redistricting was accomplished in Wisconsin in 2011?

9 A No.

10 Q Do you consider the implementation of Acts 43 and 44 to be
11 GAB's responsibility?

12 A Yes.

13 Q Other than the adoption of statutes that affect elections,
14 is implementation of Acts 43 and 44 in any way the
15 legislature's responsibility?

16 A I can't answer that. I don't -- I can't speak to that.

17 Q Mr. Kennedy, I'd like to ask you a little bit about the
18 timing for the elections under Acts 43 and 44.

19 MR. SHRINER: Your Honor, if I may interrupt to
20 remind Mr. Poland we're not talking about Act 44 as his outline
21 didn't reflect that.

22 MR. POLAND: I withdraw the question, your Honors.

23 BY MR. POLAND:

24 Q Mr. Kennedy, I'd like to talk about the timing for the
25 general elections under Act 43. What is the petition

1 circulation date to get on the ballot for the primary for
2 Assembly districts and Senate districts?

3 A Candidates may begin circulating nomination papers on
4 April 15 of 2012. They have to be filed in our office no later
5 than 5:00 p.m. on June 1st. I think that might be a weekend,
6 in which case it's the next business day.

7 Q Are those dates that can be changed by the legislature or by
8 a Court?

9 A If they're changed, it would have to be by legislature or
10 court. We cannot.

11 Q And what about the timing for the recall elections -- well,
12 let me ask this question. Have recall elections been certified
13 yet?

14 A No, they have not.

15 Q The deadline for objections to recall petitions for State
16 Senate has passed; is that correct?

17 A The challenge deadline passed as well as the response and
18 reply period, yes.

19 Q When do you expect to set an election date for any recall
20 elections that might go forward?

21 A We have not determined that. We are still reviewing the
22 challenges. We have a number of issues that the board has to
23 consider separately. The trial court has given us till
24 March 19 to make that decision.

25 Q And Mr. Kennedy, it's correct, isn't it, that under the

1 express text of Act 43, the Assembly and Senate district
2 boundaries do not become effective until the general elections
3 next fall; is that correct?

4 A If you mean by effective for conducting elections, yes.

5 Q Correct. Could we get Exhibit 186, please. Mr. Kennedy,
6 would you please turn to Exhibit 186 in your binder. I'm
7 sorry, make that 166. I apologize. Mr. Kennedy, can you
8 identify what Exhibit 166 is, please.

9 A It's a series of documents that were prepared by the staff
10 of the Government Accountability Board. The first document is
11 a document entitled Legislative Redistricting Act 43 Effective
12 Dates for Election and Representation Purposes. That's what we
13 call a guideline. It's sort of a short summary to provide
14 direction to help people answer questions without calling us
15 for specific answers that relate to that.

16 The next three pages are -- is a memorandum that was
17 prepared for the Government Accountability Board's November 9th
18 meeting, which was the basis for adopting the guideline that
19 preceded that. And then following that is a communication that
20 went out to local election officials that were impacted by the
21 board's decision in terms of how to apply Act 43.

22 Q Mr. Kennedy, I'd like to turn your attention to the second
23 page of the memorandum that says that it's for the meeting of
24 November 9th, 2011. And up at the top there's some language
25 that sets forth from Section 10 initial applicability, and that

1 states, I believe it's reading from -- it's right from the
2 statute, the express language. It states this act first
3 applies with respect to regular elections to offices filled at
4 the 2012 general election. Do you see that?

5 A Yes, I do.

6 Q And then the text that follows, would you read that, please
7 in the second enumerated paragraph?

8 A Sub 2 of Section 10 reads "This act first applies, with
9 respect to special or recall elections, to offices filled or
10 contested concurrently with the 2012 general election."

11 Q Mr. Kennedy, if you turn to the previous page of the
12 memorandum, you'll see that it states that it's from you; is
13 that correct?

14 A That's correct.

15 Q If you would turn back to where we just left off on page 2,
16 would you read the first sentence of the paragraph directly
17 below the paragraphs enumerated 1 and 2, please, just the first
18 sentence.

19 A Based upon the plain language of Section 10(2) of Act 43,
20 staff has concluded that any special or recall election to be
21 filled or contested prior to the 2012 general election must be
22 conducted using the legislative district boundaries which
23 existed prior to the enactment of Act 43.

24 Q And those would be the boundaries were put into place by
25 this Court in 2002; is that correct?

1 A That's correct.

2 Q And did you make a recommendation -- was that a
3 recommendation that you made to the board itself?

4 A Yes. The recommendations actually on page 72 are the
5 recommended motions for the board to adopt.

6 Q And so that's under the enumerated paragraph 1 on the
7 following page then where it states "The board adopts the
8 analysis and conclusions contained in the attached staff
9 memorandum dated October 19, 2011"?

10 A Yes.

11 Q Is that correct? So the Government Accountability Board,
12 the board itself, the independent board of six judges adopted
13 that position?

14 A That's correct.

15 Q Now, Mr. Kennedy, that is currently the Government
16 Accountability's position that it will run the recall elections
17 for State Senate, if any do occur, under the 2002 district
18 boundaries drawn by this Court?

19 A Yes.

20 Q Are you aware of any legislative effort to make the
21 effective date of Act 43 and the new boundaries any sooner than
22 it is now?

23 A My understanding is there's been legislation introduced to
24 change that. Nothing has passed, the legislature even passed,
25 that I'm aware of.

1 Q So nothing has come of that legislation or proposed
2 legislation, at least not yet.

3 A That's right.

4 Q Is it GAB's position that conducting the recall elections
5 for State Senate will not result in the violation of the
6 plaintiffs' rights under the Wisconsin or federal
7 constitutions?

8 A I can't speak to the GAB's position. What the GAB
9 determined was the information set out here on how we're going
10 to conduct the elections.

11 Q Do you know, are you familiar with the positions that the
12 GAB has taken in this particular case in response to the
13 plaintiffs' claims?

14 A Yes.

15 Q I'd like to please have you turn to Exhibit No. 12 in your
16 binder, please. Mr. Kennedy, you'll see that Exhibit 12 is the
17 GAB's answer and affirmative defenses to the second amended
18 complaint for declaratory and injunctive relief. Do you see
19 that?

20 A Yes.

21 Q And I'd like you to turn to page number 39 of this document.
22 It's paragraph 94. Mr. Kennedy, do you see that in responding
23 to the allegation in paragraph 94 the GAB admits that any
24 elections conducted under the now unconstitutional boundaries
25 established by this Court in Baumgart, and it gives the

1 citation, will deprive the individual plaintiffs of their civil
2 rights under color of state law in violation of 42 USC
3 Sections 1983 and 88. Do you see that?

4 A Yes.

5 Q And was that an answer that you saw and approved of when it
6 was filed?

7 A That was an answer that was prepared by our attorneys.

8 Q And who are the attorneys who prepared that, Mr. Kennedy?

9 A The attorneys that are representatives here in Court today.

10 Q And so if we turn to page 45 and 46, you'll see that is the
11 Wisconsin Department of Justice; correct?

12 A That's correct.

13 Q And an outside counsel, the Reinhart Boerner Van Deuren law
14 firm; correct?

15 A That's correct.

16 Q I'd like to turn back to paragraph 94, please, and do you
17 see the last sentence in the answer to paragraph 94 alleges
18 "However, conducting elections under 2011 Wisconsin Acts 43 and
19 44 will not deprive anyone of their civil rights. Defendants
20 deny all remaining allegations in paragraph 94." Do you see
21 that?

22 A I do.

23 Q Did you prepare that language, Mr. Kennedy?

24 A No, I did not.

25 Q Was that your counsel in this case again who prepared that?

1 A That's correct.

2 Q I'd like you to turn then, please, to page 45 once more.
3 And I'd like to turn your attention to paragraph 4 where there
4 is a demand for judgment. Do you see that the Government
5 Accountability Board asked in this paragraph that this Court,
6 quote, "declare and establish the election district boundaries
7 under which the defendants should conduct the recall and
8 special elections prior to the regular primary and general 2012
9 elections"?

10 A Yes.

11 Q And again, that was language that was drafted by your
12 counsel; correct?

13 A That's correct.

14 Q Mr. Kennedy, did you review each of these pleadings that
15 were -- in advance that were signed by your counsel?

16 A Yes.

17 Q Other than your own staff -- strike that. All right, now,
18 Mr. Kennedy, are you aware that another lawsuit has been filed
19 against the Government Accountability Board in Waukesha County
20 Circuit Court?

21 A Yes.

22 Q And that was filed the very week after or just several days
23 actually after the GAB's answer to the second amended complaint
24 in this case was filed; correct?

25 A That's correct.

1 Q I'd like you to turn to tab 17, please, in your binder. Are
2 you aware that in this complaint a group of plaintiffs sued the
3 Government Accountability Board asserting a claim that Act 43,
4 the Act 43 State Senate boundaries must be used for any State
5 Senate recall elections and that using the 2002 Senate district
6 boundaries drawn by this Court, meaning this federal Court here
7 in the Baumgart case, for the recall elections would be
8 unconstitutional?

9 A Yes.

10 Q I'd like you to turn to paragraph 57, please, which is on
11 page 16 of Exhibit 17.

12 A Sorry, which paragraph?

13 Q Paragraph 57. Do you see paragraph 57 alleges plaintiffs
14 respectfully request that an order been issued declaring the
15 2011 redistricting plan as enacted by 2011 Wisconsin Acts 43
16 and 44 to be legally valid? Do you see that allegation?

17 A Yes.

18 Q Do you know whether that allegation is still pending?

19 A I -- I can't speak to the status of the case at this point.

20 Q And do you see the allegation in paragraph 58 that the
21 plaintiffs in the Clinard case filed in Waukesha County Circuit
22 Court requested that an order be issued declaring the
23 legislative districts established by the 2002 court plan, that
24 was this Court in the Baumgart case, are unconstitutional?

25 A I see that.

1 Q And do you see that paragraph 59, the allegation is that the
2 plaintiffs request an order be issued enjoining the GAB from
3 taking any action related to the conduct of any recall election
4 in the unconstitutionally malapportioned legislative district
5 established by the 2002 Court plan?

6 A I see that.

7 Q Do you know what the status of those claims is?

8 A I have not been advised that these claims have been
9 adjudicated.

10 Q Mr. Kennedy, if you look on the next page, page 17, you see
11 that the plaintiffs who filed the lawsuit are represented by
12 the law firm of Michael Best & Friedrich?

13 A Yes.

14 Q Now, those are the very same lawyers at Michael Best &
15 Friedrich who also represent the Wisconsin legislature and who
16 were representing the legislature at that time; is that true?
17 Do you know that?

18 A That's my understanding, yes.

19 Q Okay. I'd like you to turn to Exhibit 188, please, and I'd
20 like to draw your attention to the very first paragraph.

21 MR. KELLY: Your Honor, I object. The engagement
22 letter between Michael Best and the state legislature couldn't
23 possibly have anything to do with the constitutionality or
24 conforming to the Voting Rights Act of Acts 43 and 44.

25 JUDGE STADTMUELLER: The objection is noted and

1 consistent with the Court's comments earlier, you may proceed.

2 MR. POLAND: Thank you, your Honor.

3 BY MR. POLAND:

4 Q Mr. Kennedy, do you see in the first paragraph that
5 Exhibit 188 states that Michael Best & Friedrich is pleased to
6 confirm the engagement to represent the Wisconsin State Senate
7 by its majority leader in connection with matters relating to
8 reapportionment in Wisconsin Senate Assembly, Wisconsin Senate
9 and Assembly districts arising out of the year 2010 census? Do
10 you see that?

11 A Yes.

12 Q And I'd like to draw your attention to the very last
13 sentence on that same page. Do you see that they were --
14 Michael Best & Friedrich was retained to represent the Senate
15 with respect to both litigation and nonlitigation matters
16 relating to the reapportionment representation?

17 A I see that.

18 Q Now, Mr. Kennedy, the day after the Waukesha County action
19 was filed on November 30, the Government Accountability Board
20 in this action, the Baldus case, amended its answer to the
21 second amended complaint; is that correct?

22 A I don't know for sure.

23 Q I'd like you to turn to tab 12 or Exhibit 12A in your
24 binder, please. And I'd like to draw your attention to
25 page 46, specifically noting do you see that it is dated as of

1 the 30th day of November, 2011?

2 A Yes.

3 Q And that's actually two days after the Waukesha County
4 complaint was filed; correct?

5 A Again, I don't know for sure but based on what we said
6 before.

7 Q All right. Mr. Kennedy, I'd like to -- I'd like to compare
8 the amendments between this amended answer to the second
9 amended complaint and then the original answer to the second
10 amended complaint. So we're going to compare what's in
11 Exhibit 12, a few things, with Exhibit 12A, okay? First of
12 all, I'd like you to look at paragraph 100 in Exhibit 12A. I'm
13 sorry, make that paragraph 94 in Exhibit 12A.

14 A Exhibit 12A.

15 Q 12A, correct. And could we have -- could we have both
16 paragraph 94 and Exhibit 12A and paragraph 94 and Exhibit 12
17 put up on the screen, please, pages -- page 40 in 12A and
18 page 39 in 12.

19 Mr. Kennedy, do you see that in answer to paragraph 94 in
20 the amended answer that's Exhibit 12A, it states paragraph 94
21 sets forth allegations of law which require no response.
22 Subject to the foregoing, defendants lack knowledge and
23 information sufficient to form a belief as to whether any
24 elections conducted under the boundaries established by this
25 Court in Baumgart versus Wendelberger, and it goes on and on,

1 will deprive any of the individual plaintiffs of their civil
2 rights and therefore deny the same. Do you see that?

3 A I see that.

4 Q And that is a change in the position and the answer from
5 what was contained in the answer to paragraph 94 in the
6 original answer to the amended complaint; correct?

7 A That's correct.

8 Q Now, in answering the second amended complaint, however, I'd
9 like you to turn to paragraph number 100 in Exhibit 12A. The
10 paragraph alleges that the challenged 2011 districts cannot
11 serve as districts for any future elections or the regular,
12 special or recall elections unless and until this Court rules
13 on the constitutionality of the districts. Do you see that?

14 A Yes.

15 Q And that allegation is denied; correct?

16 A Yes.

17 Q Is that still the Government Accountability Board's
18 position?

19 A That is the position that our attorneys put forth, yes.

20 Q And if we look at paragraph 101, the allegation is that the
21 2002 districts therefore are the only legal, valid and proper
22 districts for any election prior to final disposition in this
23 case. Do you see that?

24 A Yes.

25 Q And do you see that's denied as well?

1 A Yes.

2 Q And is that still the GAB's position?

3 A That's the position our attorneys are taking, yes.

4 Q Finally, Mr. Kennedy, I'd like to draw your attention to
5 page 46 of Exhibit 12A. Do you see the paragraph 4 requests
6 the following. It states, If the Court determines that the
7 Government Accountability Board's compliance with Act 43,
8 Section 10(2) and Act 44, Section 4(2) will violate any law
9 with regard to the allegations herein, that this Court declare
10 and establish the election district boundaries under which the
11 defendants should conduct the recall and special elections
12 prior to the regular primary and general 2012 elections. Do
13 you see that?

14 A I do.

15 Q Mr. Kennedy, are you aware that the Government
16 Accountability Board has raised a 11th amendment argument that
17 it believes bars the plaintiffs' count nine in this case?

18 A I'm not entirely aware, no. I'd have to be -- it would have
19 to be directed to me. I couldn't tell you that right this
20 minute.

21 Q Was that something -- was that bar something that you or the
22 GAB raised or did your lawyers raise it?

23 A Our attorneys are representatives in developing legal
24 strategies.

25 Q If I represent to you that the first time that that was

1 raised in this case to the plaintiffs' knowledge was in a
2 motion in limine filed with respect to your testimony on
3 February 15, do you have any reason to dispute that or any
4 other information?

5 MR. KELLY: I object. That question mischaracterizes
6 the state of the records in writing.

7 THE WITNESS: I would like you to restate the
8 question so I can formulate an answer.

9 MR. POLAND: Could you read that back?

10 (The record was read as follows:

11 "If I represent to you that the first time that that
12 was raised in this case to the plaintiffs' knowledge was in a
13 motion in limine filed with respect to your testimony on
14 February 15, do you have any reason to dispute that or any
15 other information?")

16 THE WITNESS: I'm sorry. Because of the breaks I
17 missed.

18 BY MR. POLAND:

19 Q If I represent to you that the first time that position was
20 raised by the Government Accountability Board in this case was
21 in a motion in limine filed with respect to your testimony --
22 I believe that motion was filed on February 15, 2012 -- do you
23 have any reason to dispute that or do you have any information
24 to the contrary?

25 A I have no information to the contrary.

1 Q And it was the Government Accountability Board's counsel,
2 the lawyers at Department of Justice and the Reinhart law firm
3 that prepared the pleadings and the motion in limine that were
4 filed; correct?

5 A I have not seen the motion.

6 MR. KELLY: Your Honor, this is all fascinating
7 pretrial process but I think we can cut to the heart of the
8 matter by saying that there is no case or controversy with
9 respect to where the recall elections are going to be held.
10 They're going to be held under the 2002 district lines.

11 JUDGE STADTMUELLER: Well, unless and until the
12 affected parties file a stipulation to that effect, that does
13 not appear to be the case from the pleadings that we have.

14 MR. KELLY: Your Honor, it becomes the case when we
15 make the representation in open Court on the record. When
16 there is no further case or controversy, the Court's
17 jurisdiction is done.

18 JUDGE STADTMUELLER: Then I would suggest that you
19 and Mr. Poland, Mr. Earle reduce it to writing and file it as a
20 stipulation and we'll dismiss the count, but as the pleadings
21 stand, that's not the case.

22 MR. POLAND: I may proceed, your Honor?

23 JUDGE STADTMUELLER: You may proceed.

24 MR. POLAND: Thank you.
25

1 BY MR. POLAND:

2 Q Mr. Kennedy, when was the Reinhart law firm appointed as the
3 Government Accountability Board's counsel?

4 A I don't know.

5 Q Who appointed Reinhart as the GAB's counsel?

6 A I don't know.

7 Q Do you consider yourself on the Government Accountability
8 Board to be clients of the Reinhart law firm?

9 A Yes.

10 Q Mr. Kennedy, when Reinhart was appointed as GAB's counsel,
11 did they or anyone else tell you they had been retained to
12 advise the legislature on the redistricting process including
13 in litigation matters?

14 MR. KELLY: I object. Now we're getting into
15 attorney-client privileged conversations.

16 JUDGE STADTMUELLER: It's a fact, so the witness is
17 instructed to answer the question.

18 THE WITNESS: We were made aware of that. It was --
19 that's all I can say.

20 BY MR. POLAND:

21 Q So you were aware that Reinhart was acting as counsel for
22 the legislature as well?

23 A We understood that at that period of time one of our
24 employees had worked for the legislature.

25 Q Okay. I'd like you to turn to Exhibit No. 5 in your binder,

1 please.

2 MR. KELLY: I'm sorry. Did -- I may have misheard
3 this. Did you ask him if he was aware of the Reinhart firm
4 acting as the legislature's counsel?

5 MR. POLAND: I don't believe I did.

6 MR. KELLY: I think you did.

7 MR. POLAND: I'll withdraw that question then and I
8 can ask a different question. No, I actually I think I asked
9 the right question. I think I asked whether -- let me ask the
10 question again just to make sure we're clear.

11 BY MR. POLAND:

12 Q When Reinhart was appointed as the GAB's counsel for the
13 purpose of representing the GAB in this case, did they or
14 anyone else tell you or inform the Government Accountability
15 Board that the Reinhart law firm had been retained to advise
16 the legislature in the redistricting process including
17 potentially litigation?

18 MR. KELLY: Objection. That mischaracterizes the
19 record. Reinhart was not engaged to represent the legislature
20 with respect to any litigation. I don't know where you're
21 getting that from.

22 MR. POLAND: Well, we've got the documents and we'll
23 see if they say that's what they say.

24 JUDGE STADTMUELLER: Why don't you cut to the chase,
25 Mr. Poland, and let's have Mr. Kennedy go through the

1 documents.

2 BY MR. POLAND:

3 Q Okay. Exhibit No. 5, please, Mr. Kennedy. And do you see
4 that's a letter dated February 17, 2011?

5 A Yes.

6 Q And that's from the -- if you turn to the third page of the
7 document, you'll see that it's signed by a representative,
8 Reinhart Boerner Van Deuren law firm. If you turn to the
9 front, the very first page again, you'll see it's to Mr. McLeod
10 at Michael Best & Friedrich; correct?

11 A Yes.

12 Q And the first paragraph states "Please find enclosed the
13 engagement letter of February 15, 2011 that I have signed on
14 behalf of Reinhart Boerner Van Deuren, S.C. I am providing
15 this letter to ensure our mutual understanding of the
16 engagement and to provide required disclosures to the client."
17 Do you see that?

18 A Yes.

19 Q And you see directly below that it identifies the clients,
20 and the clients are the Wisconsin State Senate by its majority
21 leader Scott L. Fitzgerald and the Wisconsin State Assembly by
22 its speaker Jeff Fitzgerald. Do you see that?

23 A I see that.

24 Q I would like you, please, to turn then to tab number 229 in
25 your binder. Do you see that's a letter dated February 15,

1 2011?

2 MR. KELLY: Counsel, may we have a copy of this
3 exhibit?

4 MR. POLAND: I think you do.

5 MR. KELLY: Thank you.

6 BY MR. POLAND:

7 Q Mr. Kennedy, do you see Exhibit No. 229?

8 A I do.

9 Q And do you see it appears to be a letter from Mr. McLeod at
10 Michael Best & Friedrich to Don N. Millis and Joseph Handrick
11 at Reinhart Boerner Van Deuren; correct?

12 A Yes.

13 Q And it's dated February 15, 2011; correct?

14 A That's correct.

15 Q Do you see that in the first paragraph it confirms the
16 engagement of the Mr. Handrick as a consultant in connection
17 with our representation of the Wisconsin State Senate by its
18 majority leader Scott Fitzgerald and the Wisconsin State
19 Assembly by its speaker Jeff Fitzgerald in the above matter
20 which involves potential litigation. Do you see that?

21 A Yes.

22 Q If you look down the fourth full paragraph on that page, do
23 you see again it restates "As this retention is in anticipation
24 of potential litigation, all matters must remain confidential
25 until such time as the client determines otherwise." Do you

1 see that?

2 A I do.

3 Q I would like you then to turn back, please, to tab number
4 six. Directing your attention to the first paragraph, do you
5 see that this letter from Mr. Millis to Mr. McLeod states "I am
6 writing to correct my letter of February 17, 2011 concerning
7 the engagement letter dated February 15, 2011 that I signed on
8 behalf of Reinhart Boerner Van Deuren, S.C. My letter of
9 February 17, 2011 incorrectly stated the payment of fees was to
10 end on May 15, 2011. As the engagement letter indicates, it is
11 anticipated that this engagement will continue through May of
12 2012." Do you see that?

13 A I see that.

14 Q Were you ever told that Reinhart's engagement by the
15 legislature for the purpose of redistricting was accomplished
16 pursuant to an agreement with Michael Best & Friedrich that was
17 intended to last through May of 2012?

18 A No.

19 Q Mr. Kennedy, there is one other proceeding that's currently
20 pending that challenges the petitions for the recall, for the
21 State Senate recalls; is that correct?

22 A I'm not sure what you're referring to.

23 Q There is a process by which challenges may be put forth
24 against petitions that have been submitted for the recall
25 elections; is that correct?

1 A That's correct.

2 Q And there had been challenges that have been filed; correct?

3 A On behalf of the Senate, yes.

4 Q And on behalf of individual members, Republican members of
5 the State Senate who are potentially subject to recall?

6 A The four members of the Senate who are named in recall
7 petitions that are filed with our office have each filed
8 challenges with our office.

9 Q Do any of those challenges contend that the 2002 boundaries
10 drawn by this Court in 2002 cannot be used for recall
11 elections?

12 A That's my understanding of the challenges, yes.

13 Q And they -- those challenges similarly allege or state that
14 the Act 43 Senate district boundaries must be used for recall
15 elections; correct?

16 A I'm sorry?

17 Q They -- in addition those challenges to the recall petitions
18 contend that the Act 43 boundaries must be used for any recall
19 elections that might be held; is that correct?

20 A I'd have to review the challenges to be sure.

21 Q I'd like to switch topics, Mr. Kennedy. Is it your
22 understanding that in previous redistricting efforts in
23 Wisconsin, the municipalities and counties completed their
24 local redistricting process before legislative districts were
25 finalized?

1 A Yes.

2 Q Now, a different procedure was followed in 2011; is that
3 correct?

4 A Yes.

5 Q Do you know why that was done?

6 A No.

7 Q Did anyone ask your opinion or GAB's opinion whether it was
8 a good idea to change the process in that way?

9 A At what time?

10 Q Before it was, before it occurred.

11 A No.

12 Q Now, as the district boundaries are currently composed,
13 there are some conflicts with ward boundaries; correct? And by
14 district boundaries, I'm referring to Assembly district
15 boundaries.

16 A I'm sorry, ask the question again.

17 Q Sure. As the Assembly district boundaries are currently
18 composed, there are some conflict with ward boundaries; is that
19 correct?

20 A Are we talking about under Act 43?

21 Q Under Act 43; correct.

22 A That's my understanding.

23 Q Now, I'd like you to turn, please, to Exhibit No. 79 in your
24 binder.

25 A I'm sorry, what exhibit?

1 Q Exhibit 79, please, Mr. Kennedy.

2 A I don't see that in your binder here. Is it 179?

3 Q No, I'm sorry, 79, sir?

4 A Again, it goes from 17 through 188.

5 JUDGE STADTMUELLER: Mr. Kennedy, it's probably
6 behind tab number 229 because they cover one another.

7 MR. POLAND: My apologies.

8 THE WITNESS: And again --

9 JUDGE STADTMUELLER: Get to 229.

10 THE WITNESS: I'm at 229. Oh, there it is, sorry.

11 MR. POLAND: Didn't mean to hide it. I apologize.

12 BY MR. POLAND:

13 Q Mr. Kennedy, can you identify what Exhibit 79 is?

14 A It is a memorandum from two of my staff to -- to two
15 additional members. The memorandum's from Sarah Witt, who
16 works with our statewide voter registration system, and one of
17 my staff counsel, Jane Falk, and it's addressed to the
18 elections division administrator in our agency, Matt Robinson,
19 and our election supervisor Ross Hein.

20 Q And this memorandum is dated November 10, 2011; correct?

21 A That's correct.

22 Q Do you see the subject line is census blocks conflicting
23 with municipal boundaries?

24 A Yes.

25 Q Mr. Kennedy, you're familiar with this memorandum?

1 A Yes, I am.

2 Q Turn, please, to page 3. I'd like to direct your attention
3 to the heading at the top of page 3 that states districts
4 created by Acts 43 -- I'll just leave out the 44 part --
5 conflict with Act 39. Do you see that, sir?

6 A I see that.

7 MR. POLAND: Now, and again, there is some language
8 in here, your Honors, that does refer to Act 44. I don't
9 intend to bring that out. I'm really addressing it only to
10 Act 43, the languages in there.

11 BY MR. POLAND:

12 Q Would you please read the first two sentences of that
13 paragraph, Mr. Kennedy.

14 A Because Acts 43 and 44 were passed creating the new senate,
15 assembly and congressional districts, the four municipalities
16 have finished creating their local wards. These districts were
17 built using census blocks. The text of these acts, now in
18 statute, specifies the district boundaries according to
19 individual census blocks.

20 Q So the district boundaries in Act 43 were specified by
21 census blocks; correct?

22 A Yes.

23 Q Now, the two sentences further down, the memorandum goes on
24 to state this is problematic for enforcement purposes because
25 those census blocks do not reflect the correct municipal

1 boundaries and the result of implementing these incorrect
2 boundaries in SVRS would place voters on the wrong poll books
3 for each election. After local clerks make these corrections,
4 the districts in SP would not match Acts 43 and 44 precisely.
5 In addition, these corrections also require splitting census
6 blocks which may conflict with Act 39's prohibition on
7 splitting census blocks. Do you see that?

8 A Yes.

9 Q I would like you to turn to the top of page 4, please, where
10 it refers to use of corrected wards in SVRS. And looking at
11 the very first paragraph, the memo states "Approximately 21
12 counties thus far have asked that we use their corrected wards
13 and/or municipal boundaries in SVRS rather than the
14 census-based lines we are getting from the legislature to
15 ensure that the lines are placed accurately and thus voters
16 show up in the correct poll lists. Because wards are the
17 buildings blocks for all the other representational districts,
18 if we use the corrected wards, this also corrects the municipal
19 boundaries, county supervisor, aldermanic, state senate, state
20 assembly, and congressional districts." Do you see that?

21 A Yes.

22 Q Mr. Kennedy, is it in the Wisconsin constitution that the
23 Assembly district boundaries must follow county, town, precinct
24 and ward lines?

25 A I don't recall.

1 Q Down at the bottom of that same page in conclusion, it says
2 "The GAB will use corrected ward and municipal boundaries at
3 the earliest possible stage of implementing the new districts."

4 Do you see that?

5 A Yes.

6 Q Now, is it your understanding that there have been conflicts
7 between the district boundaries under Act 43 and ward lines or
8 municipal boundaries?

9 A Yes.

10 Q Do those still exist?

11 A I don't know.

12 Q When was the last time that you spoke with someone about --
13 in your staff about whether there were still -- strike that
14 question. Do you know whether counties and municipalities are
15 in the process of revising ward boundaries to make them conform
16 to Assembly district boundaries?

17 A I do.

18 Q Okay. Is that something that's ongoing?

19 A Yes.

20 Q That's -- the process is not yet complete, is it?

21 A No.

22 Q It's an ongoing process?

23 A It's an ongoing process. There's also provisions for them
24 to make these changes by April 10.

25 Q By April 10?

1 A Yeah, Act 39 as amended by subsequent statute requires them,
2 meaning the municipalities, to adjust their boundaries.

3 Q Is it no longer -- I believe it was May 15 as originally
4 passed in Act 39.

5 A It was adjusted by subsequent legislation that moved the
6 circulation date for nomination papers from June 1st to
7 April 15.

8 Q I see. So until April, until April 10, you said?

9 A That's my recollection, yes.

10 Q So until April 10 is the deadline for municipalities to
11 adjust their ward boundaries or municipal boundaries, precinct
12 lines to match Act 43; is that correct?

13 A Yes.

14 Q Until that time, is it your understanding that there might
15 continue to be conflicts between Assembly district boundaries
16 and local municipal or ward boundaries?

17 A That's my understanding.

18 Q And currently there are at least some of Assembly districts
19 that are not bound by county, precinct, town or ward lines?

20 A I don't know.

21 MR. POLAND: I have no further questions.

22 JUDGE STADTMUELLER: All right. Thank you,
23 Mr. Poland.

24 MR. SHRINER: Your Honor, from the back of the room,
25 may I observe Mr. Kennedy's voice is dropping off. It's

1 difficult to hear back here.

2 JUDGE STADTMUELLER: Thank you, Mr. Shriner.

3 Mr. Kennedy, if you would, you can tilt the mic perhaps to
4 position it that your voice will project more directly.

5 THE WITNESS: I'll move closer to the microphone.
6 How's that?

7 JUDGE STADTMUELLER: Thank you. Mr. Earle, do you
8 have any questions?

9 MR. EARLE: No, your Honor.

10 JUDGE STADTMUELLER: All right. Mr. Kelly, you may
11 proceed.

12 CROSS-EXAMINATION

13 BY MR. KELLY:

14 Q Good afternoon, Mr. Kennedy.

15 A Good afternoon.

16 Q A couple preliminary matters. I want to make sure that I
17 understood in your testimony, the GAB did not play any role in
18 adopting Acts 43 or 44?

19 A That's correct, we did not.

20 Q What is the GAB's responsibility with respect to Acts 43 --
21 Act 43?

22 A We used those boundaries to run the elections for the state
23 of Wisconsin.

24 Q So the terms of Act 43, they control what the GAB does with
25 respect to elections?

1 A That's correct.

2 Q And is it your job to faithfully follow the terms of Act 43?

3 A Yes.

4 Q Do you believe you are capable of faithfully following the
5 terms of Act 43?

6 A We are making every effort to make sure that we do that.

7 Q And your efforts will be successful before the elections are
8 held, won't they?

9 A That's our plan.

10 Q Mr. Kennedy, there has been some question about census block
11 boundaries and how they might relate to other boundaries. Has
12 this ever come up before?

13 A I don't recall.

14 Q Do you know if in the last redistricting there was
15 circumstances in which there were some difficulties in
16 identifying where the actual boundaries were supposed to be?

17 A Yes.

18 Q What were those difficulties?

19 A I just know that election officials routinely have problems
20 with census data, having it match up with the information that
21 they have in their offices based on the maps that are done at
22 their local level or information they have.

23 Q And the difficulties that are being experienced currently,
24 are those any different from what they were ten years ago?

25 A No.

1 Q Are there more or fewer problems this year than ten years
2 ago?

3 A I don't know.

4 Q Did you have -- have any of the clerks mentioned to you that
5 perhaps the scope of the problems this time around were not as
6 severe as last time around?

7 A That's one of the things that's been represented to me, yes,
8 by local election officials.

9 Q Mr. Kennedy, is it the GAB's position here today that the
10 recall elections that occur prior to November of 2012 will be
11 conducted in the district lines established by the federal
12 court in 2002?

13 A That's our position now, yes.

14 Q Mr. Kennedy, whose responsibility is it to engage outside
15 counsel for matters such as this?

16 A The Department of Justice.

17 Q Did the Department of Justice fulfill that responsibility
18 with respect to this case?

19 A They are the ones that I assume made the arrangement for
20 you. My understanding it was also governor -- gubernatorial
21 approval is what my understanding is required as well.

22 Q Now, in -- in engaging outside counsel, is it your
23 responsibility to make sure all prior engagements have been
24 included or would that be the Department of Justice's
25 responsibility?

1 A I would rely on the Department of Justice to do that.

2 Q Do you have any reason to believe that the Department of
3 Justice failed to discharge that responsibility?

4 A I can't respond to that. I don't know.

5 Q Do you have any information to suggest that they did fail in
6 that responsibility?

7 A No, I don't.

8 Q Mr. Poland was -- showed you Exhibits 229 and Exhibit 6.
9 You don't need to put them up. These were the engagement
10 letters with respect to assisting the legislature in developing
11 Acts 43 and 44. One of them referred to Joe Handrick being
12 retained as consultant to assist in that process. Do you
13 recall that?

14 A Yes.

15 Q Do you know when -- did you -- I'm sorry. Were you aware
16 that his engagement ended last summer?

17 A No, I was -- I don't know. I know that there was a
18 discussion we had with the Department of Justice.

19 Q About the length of that engagement?

20 A That's right.

21 Q And the Department of Justice informed you that that
22 engagement had terminated?

23 A That's my recollection.

24 Q Could you put up Exhibit 12, please. If you could go to the
25 affirmative defenses towards the end of that exhibit. Let's go

1 to the next page. The next page, please. We have many
2 affirmative defenses. Next page, please. The next page. One
3 moment, please. I need to check an exhibit. Well, that was
4 fun. Let's do that with 12A. The next page. All right.
5 Thank you. Let's take a look at paragraph 16.

6 All right. Mr. Kennedy, do you see where it says in
7 paragraph 16 "Defendants hereby incorporate by reference and
8 reserve the right to assert any and all of the affirmative
9 defenses set forth by any of the other defendants or intervenor
10 defendants"?

11 A Yes.

12 Q Now, you're an attorney, Mr. Kennedy? That's correct?

13 A Yes, I am.

14 Q You understand that when a pleading incorporates by
15 reference other material, it is as if it is in that document
16 itself.

17 A That's my understanding, yes.

18 Q Have you reviewed any of the affirmative defenses set forth
19 by any of the other defendants or intervenor defendants?

20 A It's been a long time since I've looked at them. I didn't
21 do that in preparation for this trial.

22 Q Well, let me test your memory here a little bit. Do you
23 recall the intervenor defendants raising the Pennhurst defense?

24 A I don't recall.

25 MR. KELLY: Nothing further. Thank you.

1 JUDGE STADTMUELLER: Thank you, Mr. Kelly. Anything
2 further, Mr. Poland?

3 MR. POLAND: Two very quick questions, your Honor.

4 REDIRECT EXAMINATION

5 BY MR. POLAND:

6 Q Mr. Kennedy, I believe that Mr. Kelly asked you, I believe
7 that you testified that there might have been two entities or
8 people involved in appointing the Reinhart law firm as your
9 outside counsel; is that correct?

10 A That's correct.

11 Q That's the Department of Justice on the one hand; correct?

12 A Yes.

13 Q And the head of that is the attorney general of the state of
14 Wisconsin; is that correct?

15 A That's correct.

16 Q On which political party's ticket did the attorney general
17 run in the last election?

18 A He ran as a Republican.

19 Q And the other person that you mentioned was the governor; is
20 that correct?

21 A That's correct.

22 Q On which political party's ticket did the governor run in
23 the last election?

24 A He ran as a Republican.

25 MR. POLAND: I have no further questions. Thank you.

1 MR. KELLY: Just a few.

2 RECROSS-EXAMINATION

3 BY MR. KELLY:

4 Q Mr. Kennedy, I believe that in Mr. Poland's first set of
5 questions, he asked about the nonpartisanship of the board. Do
6 you recall that?

7 A I do.

8 Q And the Government Accountability Board is nonpartisan?

9 A That's correct.

10 Q And you endeavor your very best to observe that
11 nonpartisanship?

12 A Absolutely.

13 Q Does it matter to you whether the attorney general or the
14 governor are Republicans or Democrats?

15 A No.

16 MR. KELLY: Thank you.

17 JUDGE STADTMUELLER: Anyone have anything further?
18 Mr. Kennedy, the Court has a couple of questions for you. As
19 you may recall, you were part of the Baumgart case that was
20 actually tried, I assume to be ten years ago.

21 THE WITNESS: Yes.

22 JUDGE STADTMUELLER: And if you recall that trial
23 took place in early April and the Court rendered a decision in
24 May, and I think you may have already answered the question
25 that was on the Court's mind, and if I recall correctly, the

1 date by which candidates could take out nomination papers back
2 in 2002 was still June 1st; correct?

3 THE WITNESS: That's correct.

4 JUDGE STADTMUELLER: And it's currently April 15;
5 correct?

6 THE WITNESS: That's correct.

7 JUDGE STADTMUELLER: And when did that change come
8 about?

9 THE WITNESS: I believe that change took effect as a
10 part of Act 75, which would have been in the fall of 2011.

11 JUDGE STADTMUELLER: Very well. Thank you. Anyone
12 have anything further?

13 MR. POLAND: No, your Honor.

14 JUDGE STADTMUELLER: Thank you much. You may step
15 down. Counsel, you may call your next witness.

16 MR. BROWN: Plaintiffs call Representative Peter
17 Barca.

18 PETER BARCA, PLAINTIFF WITNESS, DULY SWORN

19 THE CLERK: Please be seated. Representative Barca,
20 would you please state your full name and spell it for the
21 court reporter.

22 THE WITNESS: Peter Barca, P-E-T-E-R, B-A-R-C-A.

23 DIRECT EXAMINATION

24 BY MR. BROWN:

25 Q Representative Barca, good afternoon.

1 A Good afternoon.

2 Q Representative Barca, you're a member of the Wisconsin State
3 Assembly?

4 A That's correct.

5 Q What area do you represent?

6 A I represent the greater Kenosha area, city of Kenosha and
7 part of the Town of Somers.

8 Q And for how long have you represented that area?

9 A Well, I've represented that area in this part of my tenure
10 for a little over three years. Prior to that I represented
11 that area for approximately eight and a half years in the
12 Assembly and for a short -- a couple of years in the Congress.

13 Q And do you recall the years for each of those tenures?

14 A I'm sorry?

15 Q Do you recall the years during which you held each of those
16 tenures, your previous tenure in the Assembly?

17 A Yes.

18 Q And also in Congress? And what time period were those?

19 A I was first elected in 1984 and I served from 1985 to -- for
20 part of 1993 in the state Assembly and Congress and the rest of
21 '93 and '94 and then I was reelected to the Assembly in 2007 to
22 serve -- or 2008, excuse me, and I served a little over three
23 years.

24 Q And you've also served as a representative in Congress?

25 A That's correct.

1 Q And during what time period did you represent the area in
2 Congress?

3 A '93 and '94. Part of '93 and all of '94.

4 Q And what area did you represent as a congressman?

5 A In that area I represented Kenosha County, Racine County,
6 Walworth County, Rock County, part of Green and part of
7 Waukesha.

8 Q And where do you live?

9 A I live in the city of Kenosha.

10 Q And for how long are you lived there?

11 A For approximately eight years. I lived in the town of
12 Somers most of my life.

13 Q And so you're familiar with the geography of the counties of
14 Kenosha and Racine?

15 A Very much so.

16 Q Can we call up Exhibit 197? Representative Barca, what does
17 that map depict?

18 A It shows primarily the entire county of Kenosha, the entire
19 county of Racine, a little bit of the surrounding areas,
20 Milwaukee, Waukesha, Walworth and Lake County, Illinois.

21 Q And to put this map in perspective, can you explain where
22 Kenosha County is in relation to the rest of Wisconsin?

23 A It's in the far southeastern corner of the state of
24 Wisconsin.

25 Q And what's the largest city in Kenosha County?

1 A City of Kenosha.

2 Q And can you see the city of Kenosha on the map?

3 A Yes, I can.

4 Q I believe actually with that screen you can circle that if
5 you like and it will show up, if you touch the screen. Thank
6 you.

7 A Keep trying here.

8 Q So it's --

9 A I left out a little bit of area that should have been
10 included.

11 Q So it's the area that's already shaded on the map represents
12 the city of Kenosha?

13 A Yes.

14 Q And the county of Racine, can you explain where that is in
15 relation to the county of Kenosha?

16 A It's north of Kenosha County. You have to go through parts
17 of Mount Pleasant to get to the city of Racine.

18 Q And you mentioned the city of Racine. Is that the largest
19 city in Racine County?

20 A Yes, it is.

21 Q And can you indicate -- I believe you already have an
22 indication of where the city of Racine is. And if we could
23 return to the full map, please. Thank you. And actually
24 I believe is there a button you can press to clear that. We
25 appreciate your drawing.

1 A I'm not seeing any buttons. Oh, here, clear all. There we
2 go.

3 Q That's fine. We don't need to worry about that. So have
4 you driven between the Downtown Kenosha area and the Downtown
5 Racine area, referring to the cities of Kenosha and Racine?

6 A Yes, I have.

7 Q And about how long a drive is that?

8 A Probably about 10 miles.

9 Q Are you familiar with how the State Senate districts in
10 southeastern Wisconsin are configured under the 2002
11 legislative map?

12 A Yes, I am.

13 Q What State Senate districts encompass Kenosha and Racine
14 counties?

15 A Well, there's two different State Senate districts. The one
16 for Kenosha represents, you know, basically all of Kenosha
17 County, short of the Town of Wheatland and a little bit of the
18 area of Burlington, which is in Racine County. And then
19 Racine, the Racine County Senate district is represented, you
20 know, primarily with almost all of Racine absent part of
21 Burlington.

22 Q And can we pull up Exhibit 178. Actually would it -- would
23 it be possible to try again with the clear button?

24 A I think that would be great. I feel humiliated by my
25 drawing skills.

1 JUDGE STADTMUELLER: The bong does not want to go
2 away.

3 BY MR. BROWN:

4 Q Thank you. So you were describing the State Senate
5 districts under the 2002 boundaries that encompass the county
6 of Racine and the county of Kenosha. Can you just point them
7 out on this map. You don't need to touch the screen.

8 A Well, Kenosha County, you want to point at the screen?

9 Q That's fine.

10 A Kenosha County Senate district you can see is in the
11 southern portion outlined by the red lines that are drawn much
12 more precisely than I could have, absent that town of
13 Wheatland, which is also in Kenosha. And then the
14 Racine County Senate district is the part just north of there
15 which is all of -- represents most of Racine County absent the
16 town of Waterford and part of Burlington.

17 Q So in the 21st Senate District, we have the city of Racine
18 as well as the county of Racine; correct?

19 A Correct.

20 Q And in the 22nd District we have the city of Kenosha as well
21 as the county of Kenosha?

22 A Correct.

23 Q Are you familiar with 2011 Wisconsin Act 43?

24 A Yes, I am.

25 Q What is it?

1 A You mean for the Racine and Kenosha County?

2 Q If you can just explain what 2011 Wisconsin Act 43
3 accomplished. What kind of law was it?

4 A You mean the reapportionment law that redid the various
5 districts for the Assembly and the Senate throughout the state.
6 Yeah.

7 Q Yes. And did you vote on the bill that became Act 43?

8 A Yes, I did vote on that measure.

9 Q And what was your vote? Was it for or against?

10 A I voted against that.

11 Q Are you aware of the way the 21st and 22nd Senate Districts
12 are configured under Act 43?

13 A Yes, I am.

14 Q And can you see that new configuration in the same map?

15 A Yes. I believe it's the part that's highlighted by the
16 darker blue would be the new 22nd Senate District and then the
17 pale blue would be the 21st.

18 Q Would you consider this to be a significant reconfiguration
19 of the Senate districts?

20 A Astonishingly different. For about a hundred years you've
21 had the Kenosha County area separate from the Racine County
22 State Senate district.

23 Q And you're referring to the entire county of Kenosha and the
24 entire county of Racine being separate?

25 A Essentially, other than for population shifts that from time

1 to time, you know, small portions in the county have gone back
2 and forth between the two Senate districts. But essentially
3 for about a hundred years you've had a Kenosha County state
4 senator and a Racine County state senator.

5 Q And under Act 43 what would you have?

6 A Well, you would obviously cross those county lines and you
7 would have a state senator for, you know, two state senators,
8 each representing different parts of each. You would have on
9 the eastern side what we would refer to as the Kenosha County
10 Senate district would have -- primarily they'd have all the
11 city of Kenosha and most of the city of Racine, and then the
12 town of Somers, most of the town of Somers and part of the town
13 of Mount Pleasant, and then the 21st Senate District would
14 have -- which typically we refer as the Racine County seat,
15 would now have the parts west of the city and Mount Pleasant
16 and the parts west of the city of -- the city of Kenosha and
17 the town of Somers.

18 Q And the community you represent, how did your constituents
19 and other community leaders react to this reconfiguration of
20 Senate Districts 21 and 22?

21 A Not well.

22 MR. KELLY: Objection, hearsay.

23 MR. BROWN: Your Honor, we're not asking for this to
24 be entered for the truth of the matter asserted. We just want
25 to find out what their opinions were.

1 MR. KELLY: No, they are offering it for the truth of
2 the matter asserted.

3 JUDGE STADTMUELLER: Well, that's your view,
4 Mr. Kelly. The objection is noted. Overruled. The witness
5 has already said he voted against it and obviously he was
6 speaking on behalf of his constituents. After all, let's be
7 pragmatic here for at least a bit.

8 MR. KELLY: Well, your Honor, I am. I can't
9 interview all of these people that he says he's talked to.

10 JUDGE STADTMUELLER: It's not being offered for the
11 truth of the matter asserted. That's the way the Court
12 understands it. You may continue, Mr. Brown.

13 BY MR. BROWN:

14 Q Again, Representative Barca, in the community you represent,
15 how did constituents and community leaders react to this
16 reconfiguration?

17 A Well, people were extremely surprised just because of the
18 history of a hundred years of having their own state senators.
19 To be factual, the newspapers in both communities had
20 editorialized against the proposed map. You know, the Racine
21 Journal Times in particular I remember had a very creative
22 editorial addressing the citizens of Kenosha in saying how this
23 map would not serve either, it would diminish the voice of
24 both, it would take away communities of interest. They noted
25 the fact that they have separate newspapers, separate media

1 markets, separate school districts, separate cities, separate
2 organizations and so on.

3 And then in the Kenosha News they also editorialized against
4 this proposed map and people throughout the community, whether
5 they be the Chamber of Commerce or veterans organizations or
6 labor groups, community activists were all very astonished
7 because of the fact that we had such a long history and because
8 the communities are so different and have such disparate
9 interests in so many cases and in many cases are rivals,
10 whether it be economic development or other kinds of
11 activities.

12 Q Mm-hm. You mentioned the differences between the
13 communities and you specifically mentioned differences in their
14 approach to economic development. Can you elaborate on those
15 specific differences?

16 A Certainly. In a couple ways. For instance, both
17 communities decided to build marinas at approximately the same
18 time. So there was a competition in terms of trying to garner
19 resources for those marinas and then trying to market and
20 promote them. Kenosha had built -- we actually passed a bill
21 back in the late nineties to try and diversify our economy and
22 created a very large industrial park in Pleasant Prairie, the
23 city built one, and then in Racine they were building their own
24 industrial parks around the same time.

25 And I know the mayors of communities, when businesses came

1 in to look to locate in Kenosha, for instance, our former
2 mayor, the longest serving mayor ever, would always try first
3 to get them in the city industrial park in Kenosha and then
4 Pleasant Prairie and then Somers or Bristol, and only as a last
5 resort would we ever consider Racine, and vice versa.

6 The current mayor of Racine is a former staff person of
7 mine, a friend, and they conversely try to get businesses to
8 locate in their city park, and within the city of Racine they
9 sell water and Kenosha sells water and so they compete in many
10 instances.

11 Q How about with respect to political structures or
12 organizations. Are there significant differences in that
13 respect?

14 A Well, there certainly are. You know, I mean, first of all,
15 there's differing organizations in each community. I mean,
16 Kenosha has American Association for University Women. Racine
17 has American Association for University Women. There's
18 veterans groups that represent each community. There's, you
19 know, community festivals, typically are separate for each
20 community, whether it be, you know, Columbus Day activity in
21 each of the communities or Cinco de Mayo or things of that
22 sort.

23 MR. KELLY: Your Honor, there could be a very long --
24 I object. There could be a very long list of this, none of
25 which are impacted by where the Assembly district is. They can

1 still have Cinco de Mayo, they can still have their community
2 interests, they can their flotillas and their yacht clubs and
3 whatever.

4 JUDGE STADTMUELLER: But they don't have dissimilar
5 representatives and I think that's Mr. Brown's point, which he
6 has, I think, adequately made. So if you want to move on to
7 something else, Mr. Brown, I think the Court gets your point.

8 MR. BROWN: Thank you.

9 BY MR. BROWN:

10 Q Continuing on from that, you know, your opinion as a
11 representative of this community for many years, does this new
12 configuration cause any concerns for you as far as the ability
13 of someone to represent both the city, the city of Kenosha and
14 the city of Racine as well as separately someone else to
15 represent the county of Kenosha and the county of Racine?

16 A Well, the concerns expressed obviously in those editorials
17 and by community leaders is, you know, has been of great
18 concern because in many cases you, as I indicated, you have
19 competing interests. But in addition to that, you know, just
20 from a representation standpoint, historically in Racine, for
21 instance, in that State Senate district, it's gone back and
22 forth I think over the last six elections between a Democrat
23 and a Republican and a Democrat and a Republican, you know, for
24 quite a long period of time.

25 In addition to that, under this map, for the city of Racine

1 they almost certainly would never be able to elect a state
2 senator from Racine because two-thirds of that population or
3 nearly two-thirds would be represented in the Kenosha County.
4 I mean, the city of Kenosha and town of Somers have a much
5 bigger proportionate population base. So if you had one person
6 running from Racine and one from Kenosha, provided they both
7 were, let's say, representatives or aldermen, almost certainly
8 the Kenosha representative would win. So I think for people
9 living in the city of Racine I think they would be concerned
10 about that.

11 In addition to that, other concerns would be that currently
12 for interests at that each city has, they have two state
13 senators. You know, for urban issues in Racine, for instance,
14 they have a very large proportion of African-American
15 community. You know, you have a state senator that has to
16 focus on that. Kenosha has similarly populations of people and
17 they have a state senator. So for urban interests, you have
18 two different state senators that are representing those kinds
19 of urban interests. Now you'll only have one, and that comes
20 to play sometimes in shared revenue formulas or school aid
21 formulas and oftentimes you're going to bat for, you know, the
22 interests of, you know, the urban part of the district. That
23 would no longer be the case.

24 Q Among your constituents and among community leaders, have
25 you heard of support for this new configuration?

1 A I've heard of no support whatsoever.

2 Q As a legislative leader from this area, was your opinion
3 ever sought about this configuration of Senate Districts 21 and
4 22?

5 A No.

6 Q When did the 2011 legislative session begin, if you recall?

7 A January 4th.

8 Q And in that new session do you recall when you first
9 discussed redistricting with legislative leadership?

10 A I believe it was on the first day that the Republicans
11 quickly called an organizational committee meeting, of which we
12 really didn't even know the topic until minutes before we went
13 in there, and they sprung upon us this notion that they would
14 have unlimited resources for attorneys and consultants and
15 specialists to represent the interests of the Republicans, and
16 the Democrats would have no representation whatsoever.

17 We proposed an amendment to have our legislative counsel
18 attorneys handle this so that not only would Democrats and
19 Republicans have the same representation but so would any other
20 political party, whether it be the Green Party or Libertarian
21 Party or any citizen of the state for that matter. But they
22 ignored that and they decided to give the Republicans unlimited
23 resources and no resources for either Democrats or anybody else
24 in the state for that matter.

25 Q Historically, do you know if it's customary for only one

1 party to receive funding for redistricting purposes?

2 A No, it's not customary. Historically there's always been
3 equal resources provided. In the State Senate, for instance,
4 they passed a provision in the Senate or committee six or nine
5 months earlier to give equal resources to both the Democrat and
6 Republican party. On the Assembly side we did not do that
7 until going into this year, but in the last reapportionment
8 that took place in 2001 or in 1991 when I was in the
9 legislature back then, there were, you know, it was always
10 basically equal resources provided so that you would have
11 access to attorneys and consultants to help ensure that both
12 parties would be equally equipped with information to be able
13 to be make informed decisions.

14 Q Did you ever secure counsel for purposes of redistricting?

15 A No.

16 Q And why not?

17 A Well, we were not given any resources. We did seek out the
18 head of the legislative counsel. Those are the attorneys that
19 generally represent legislators in bills, and asked the degree
20 to which they would be able to provide us with legal counsel,
21 and they indicated that we could expect very little support in
22 this regard because they didn't have anybody that was very
23 knowledgeable in this area and they didn't have the resources
24 to be able to have somebody research and spend much time on
25 this. Their resources were allocated already.

1 Q You did, however, have access to computer terminals with
2 mapping software; is that correct?

3 A Yes, we did.

4 Q Did you use the computer terminal to draw maps?

5 A Well, we did have a computer terminal available to us. At
6 one point we did set that up and began to analyze data to at
7 least get some sense of, you know, what -- how proportion --
8 how proportionately populations had shifted, but we never
9 really got to the point where we felt we had adequate resources
10 to draw a map and be able to bring it up and try and garner
11 support for it.

12 Q What kind of resources beyond the computer itself would you
13 have needed to draw a map?

14 A Well, I mean, typically you have people who are, you know,
15 experts that can be strictly dedicated on this issue. I mean,
16 the Republicans, I believe, spent over half a million dollars
17 in attorneys and mapping experts and people that could help
18 them put this together, and we had no such resources.

19 Q Do you know if the Republican caucus also had access to a
20 computer terminal or computer terminals?

21 A Yes, they did.

22 Q And at the time that this was happening, did you know that
23 the Republicans were drafting maps out of the offices of the
24 law firm of Michael Best & Friedrich?

25 A No, I had no idea of that.

1 Q Did you know at the time that Republican members of the
2 legislature had signed secrecy agreements concerning meetings
3 about the maps that they were developing?

4 A No, I've never heard of anybody signing a secrecy agreement
5 that's been in the legislature. I was astounded to learn of
6 that a couple weeks ago.

7 Q So that's not something that you've ever seen before in any
8 legislative context?

9 A Never, and neither has people like Senator Risser who's
10 served 50 years.

11 Q When was the bill that became Act 43 introduced to the
12 public?

13 A It was introduced to the public, draft versions were made
14 available on July 8.

15 Q And do you know how much time elapsed before it was actually
16 passed by the legislature?

17 A Well, on July 11 they were formally introduced so they no
18 longer were drafts. So on that date the public would have had
19 access to the maps that they would have a public hearing on
20 just two days later, and two days after that on July 15 they
21 were voted out of the Senate committee that has oversight for
22 that bill. And -- and then on July 19, which would have been
23 four days after that, they were passed by the Senate on a party
24 line vote, and on July 20 the next day they were taken up in
25 the Assembly and passed.

1 Q Did you or any other Democrats propose an alternative to
2 Act 43?

3 A No, we did not.

4 Q And why not?

5 A Well, we just didn't feel again, as I stated earlier, that
6 we had adequate resources to be able to do that. The other
7 issue, though, was just the timing of it. Historically in
8 Wisconsin we've always relied upon ward lines that were brought
9 forward by the city councils and county boards. So you would
10 start with that as a building block for the process.

11 So we had assumed that -- that we had certainly would have
12 had much more time, because under the timeline given to us back
13 in January by our LTSB, which is our Information Technology
14 Bureau of the legislature, they mapped out a timeline that
15 indicated that in the fall is when we would actually begin this
16 process. And, of course, they were depending upon the historic
17 tradition of waiting till ward lines were drawn by the local
18 units of government.

19 So, of course, I'm sure the Court is familiar with just how
20 chaotic of a year it was in 2011 with everything from
21 collective bargaining to, you know, budgeting processes and
22 severe cuts in education. So up until the time the budget
23 passed on, you know, June 25 or 27, somewhere thereabout, you
24 know, our time was entirely dedicated to all of those issues
25 that capture the public's attention with tens of thousands of

1 people at the Capitol protesting.

2 So up until the budget was passed, we really were not -- we
3 didn't have much time nor did we think it was necessary to
4 focus on something like reapportionment, thinking that we'd
5 have the entire summer until after the local units of
6 government had completed their process. So it was both the
7 resources and also sort of the timeline and the tradition that
8 had been followed that we never expected that, you know, they
9 would spring this on us and 12 days later after they had --
10 just even a draft was introduced that they would actually be
11 passed.

12 MR. BROWN: Thank you very much. No further
13 questions.

14 JUDGE STADTMUELLER: Thank you, Mr. Brown.
15 Mr. Kelly?

16 CROSS-EXAMINATION

17 BY MR. KELLY:

18 Q Good afternoon, Mr. Barca.

19 A Mr. Kelly, nice to see you again.

20 Q It's good to see you as well. I want to start with the
21 basic principle and I think it's important to have that
22 established right away. You are a representative of the people
23 of the state of Wisconsin, are you not?

24 A Correct. I'm specifically elected by the people of Kenosha
25 and greater Kenosha and town of Somers.

1 Q And that's Assembly district -- which assembly district is
2 that?

3 A 64.

4 Q And we have how many assembly districts in the state of
5 Wisconsin?

6 A 99.

7 Q So you are one of 99 voices in the state legislative
8 Assembly?

9 A This is correct.

10 Q Am I to take it that there is -- that there are divisions in
11 philosophy and objectives and priorities amongst the
12 representatives of people of the state of Wisconsin duly
13 assembled in their legislature?

14 A Occasionally. Much more regularity this last year.

15 Q And there's nothing untoward about those differences, is
16 there?

17 A No.

18 Q You wouldn't seek to impose your will on all 98 other
19 assembly members, would you?

20 A I would seek to convince them that my point of view is the
21 best one.

22 Q Of course, and you would expect that they would try to do
23 the same with respect to you.

24 A Right.

25 Q So there's a give and take in the legislative process.

1 A True.

2 Q It's important that there's a give and take in the
3 legislative process, isn't it?

4 A True.

5 Q You represent the people of the state of Wisconsin to adopt
6 matters of important policy?

7 A Correct.

8 Q And Mr. Barca, it's important that important decisions on
9 policy be made by representatives of the people of the state of
10 Wisconsin, isn't it?

11 A Correct.

12 Q In fact, isn't it true that it is the fact that important
13 policy decisions are made by representatives that gives them
14 legitimacy?

15 A Yes, and hopefully reflects obviously the will of the
16 people.

17 Q Of course. We are -- we are governed by the consent of
18 those who are governed.

19 A Correct.

20 Q And the consent of those who are governed have elected a
21 certain number of Republicans and a certain number of Democrats
22 to the state legislature.

23 A Correct.

24 Q And in the Assembly, the current balance favors one party
25 over another.

1 A Correct.

2 Q This time it's the Republicans over the Democrats.

3 A Correct.

4 Q Prior to that it was the Democrats over the Republicans.

5 A Yes.

6 Q And so on and so forth back and forth over time.

7 A Yes.

8 Q Now, when we talked last we talked a little bit about your
9 background in redistricting, and I wonder if you'll recall you
10 told me that you don't consider yourself an expert on
11 redistricting.

12 A That's correct.

13 Q All right. And you also said that it's not really even a
14 policy issue that you spend a lot of time on.

15 A Correct.

16 Q In fact, I don't think you had ever heard of the
17 redistricting staff working group at that time; is that right?

18 A That's correct.

19 Q And at the time that we talked last --

20 A I want to just make it sure that we're clear. I knew that
21 there was staff working on this but I had not heard of this
22 particular group.

23 Q And that's a good point, because you knew on the first day
24 of the legislative session the redistricting was going to be an
25 issue during the session.

1 A Yes.

2 Q You were told that by legislative leadership.

3 A Told that by the constitution.

4 Q So you knew from the constitution it was going to be an
5 issue.

6 A Yes.

7 Q And you talked with other legislators and you knew from them
8 as well that at some point this was going to have to come up.

9 A That's right.

10 Q Now, at some point I think you mentioned something about a
11 computer work station being made available. Do you recall
12 that?

13 A Yes.

14 Q And that had a program by the name of autoBound on it?

15 A Could be. I don't remember the exact program but certainly
16 there's software that allows people to use computers.

17 Q So you're not familiar with the types of software available
18 to assist with redistricting?

19 A Not completely, no, I'm not.

20 Q All right. So you decided you were not going to have the
21 computer work station in your office?

22 A Correct.

23 Q But there was some discussion about where to put it.

24 A Yes.

25 Q Now, there were, if I recall correctly, there were four

1 computer work stations made available to the legislature, one
2 to each caucus; is that right?

3 A That's correct.

4 Q And each of the caucus leaders were given the authority to
5 determine where that computer work station went.

6 A That's correct.

7 Q So for the Assembly Democrats, it was your decision to make
8 where that computer work station went.

9 A Yes.

10 Q And you decided that it would go to Representative Kessler.

11 A That's correct.

12 Q And you decided it would go to Representative Kessler
13 because, I think as you put it to me, he likes to draw maps
14 like other people like to go to the gym.

15 A That's correct.

16 Q All right. Now, there was -- there was some measure of
17 concern, however, in giving that computer work station to
18 Representative Kessler. Do you recall telling me that?

19 A There were some members of our caucus that would not be too
20 enthusiastic about him having it in his office.

21 Q And they weren't enthusiastic because they were worried that
22 he might draw a map that would -- that would disadvantage them.

23 A Perhaps.

24 Q Members of your own caucus.

25 A Perhaps that might be part of it.

1 Q In fact, I think what you told me was, if I might quote,
2 there was considerable concern some of the parts of members of
3 our caucus that there be input from all members before maps be
4 drawn and there was some concern about Representative Kessler
5 drawing them because of where he would be -- he might do
6 something unfavorable to them specifically. Do you remember
7 telling me that?

8 A Yes, that would be one of the issues.

9 Q So you as a result, you told Mr. Kessler not to draw any
10 maps.

11 A Correct.

12 Q He could have drawn maps but you told him not to.

13 A Well, I told him to hold off because we would want to get
14 the input of all the members of the caucus prior to drawing a
15 map that we would bring forward.

16 Q And you never got any of that input of the members of the
17 caucus such that would allow Representative Kessler to draw a
18 map.

19 A That's correct.

20 Q So your instructions stood that he was not to draw a map.

21 A Mm-hm, right.

22 Q Now, the input that the other members of the caucus wanted
23 to have, I think you said -- I asked you they would want to
24 know how the map Representative Kessler drew would affect them;
25 right?

1 A Certainly that would be part of it. Part of it I think they
2 would want to see the ward lines that came out of their
3 communities. They'd want to understand what the population
4 shifts were, if they had to lose population or gain population.
5 Those would be the kinds of considerations they would want to
6 look at so they would have some sense if they had to lose a
7 thousand citizens out of their district, how these borders
8 might change.

9 Q Mm-hm. And one of the thoughts, one of the areas of input
10 they wanted to have, one of their concern was how the change in
11 the districts might affect their ability to be reelected.

12 A That would certainly be a consideration, I'm sure, for many
13 people.

14 Q And members of your caucus?

15 A There was -- there wasn't -- members of any caucus.
16 Independent, Republican, Democrat, that would be one issue.

17 Q That makes sense. You want to make sure that you get back
18 into the legislature.

19 A Mm-hm.

20 Q Is it in any way illegitimate for the members of the
21 caucuses to be concerned about their chances for reelection?

22 A No, but that certainly that wouldn't be their only
23 consideration, but it certainly is not illegitimate for that to
24 be one consideration that people would have.

25 Q Now, Mr. Kessler then throughout the redistricting process,

1 he had this autoBound work station in his office.

2 A Yes.

3 Q Now, under instructions from you not to draw any maps.

4 A Mm-hm.

5 Q Now, I know Mr. Kessler's not a lawyer but when we talked
6 last, you indicated that he knows of the legal standards that
7 are involved in writing maps.

8 A He has a general sense of it, yes, he does.

9 Q So he could have drawn a map and proposed it to -- well,
10 let's say, he could have proposed it to the Republicans.

11 A Correct.

12 Q Could have proposed it to your caucus.

13 A Correct.

14 Q Could have had it open for discussion.

15 A Yes.

16 Q And that -- and that computer work station was available as
17 early as February, was it?

18 A February or March. I'm not sure of the exact date.

19 Q Mm-hm. So during that period of time between February and
20 March and July, now, when the legislation that became Act 43
21 was introduced, there was several months there where
22 Mr. Kessler could have been writing maps while other people
23 went to the gym.

24 A Well, that's true, although I do want to remind you of my --
25 both of my depositions I stated just shortly before that that

1 was a period in which people were not focused on
2 reapportionment. His time, as well as everybody else's time,
3 would have been on the budget, would have been on many other
4 bills that were coming forward. We fully expected that there
5 would be plenty of time throughout the summer and early fall to
6 focus on this issue.

7 Q Sure, and I understand that. That was apparently based on a
8 faulty assumption that it wouldn't come up until later.

9 A Yes, that's correct. It was a faulty assumption. We
10 expected, as we'd done over the last 50 years, you would wait
11 for ward maps to be completed.

12 Q Now, you mentioned that you don't have -- that you're not an
13 expert in redistricting and that you don't spend a lot of your
14 time on that subject, so perhaps you don't know this, but I'll
15 ask. We'll see if you do. Are you aware that the legislative
16 districts are always ultimately based on census blocks?

17 A I would imagine that when the city councils and county
18 boards are drawing their ward maps, that that's what they look
19 at, but I don't know to what degree it's exactly that, that
20 terminology.

21 Q Well, the terminology of the census block is simply data
22 that the Census Bureau gives you; right?

23 A Sure.

24 Q And you build wards out of that.

25 A Right, I believe that's right.

1 Q Okay. So what's happened this time is instead of drawing
2 wards based on census blocks and then building those into
3 districts, this time the districts built the census blocks and
4 then the wards were based on that; right?

5 A Right. Essentially I guess you flipped it upside down.

6 Q Sure. One way or the other it's going to be census blocks.
7 Yes?

8 A That would be the building block, yes.

9 Q Now, there is -- there's no constitutional infirmity in
10 building an Assembly district based on a census block as
11 opposed to a ward, is there?

12 A Well, my understanding is that the constitution actually
13 states that reapportionment should occur based upon, you know,
14 county boundaries, city boundaries, town boundaries and ward
15 lines. So, in fact, the law itself stated that you had to use
16 ward lines. So my understanding is when they passed the law,
17 they actually had to change the law that very same time that
18 they were passing it to no longer respect what the previous law
19 was, and it's not clear to me exactly whether or not that would
20 be constitutional since the constitution specifically does
21 mention ward lines.

22 Q Thank you for bringing that up. The legislature did change
23 the order of precedence and they said we will build the
24 districts out of census blocks and then the wards will be based
25 on that and when the process is done, Assembly districts are

1 based on -- encompass the ward blocks.

2 A Yes, that's correct.

3 Q All right. So it's a procedural difference.

4 A Well, I think that with all due respect, I think it's far
5 more than procedural. It's -- the whole concept of it is that
6 typically legislators rely upon input from their local
7 officials, from citizens in their district, and so it's more
8 than just procedural. After those ward lines are completed,
9 then typically local officials will talk to their
10 representatives about where they think boundaries could shift
11 proportionately and citizens will weigh in and give their
12 advice and ideas to their legislators in terms of how you can
13 take into account citizen input. I mean, you know, as you and
14 I both agreed earlier, you know, the will of the people should
15 be the law of the land.

16 Q Exactly. So additional political process ensuring the
17 decisions that we make are the result of the consent of the
18 governed; right?

19 A Correct.

20 Q Okay. Now, I'd like to change our focus of attention for a
21 moment and let's put up Exhibit 1053. Now, I believe you
22 mentioned that the legislation that became Act 43 was
23 introduced on July 11; is that right?

24 A Correct.

25 Q Okay. Can we go to the second page of this exhibit. Well,

1 actually let's -- yes, right there for a moment. Let's look at
2 the top of Exhibit 1053, and this appears to be an e-mail from
3 Rich Judge to pbarca7@yahoo.com. Now, pbarca7@yahoo.com,
4 that's you.

5 A Yes, that's correct.

6 Q Rich Judge is your chief of staff?

7 A Chief of staff.

8 Q And this is sent on July 1st, 2011?

9 A Correct.

10 Q So this is ten days before Senate Bill 148 or 149 were
11 introduced?

12 A Right. It's seven days before the draft versions were made
13 available.

14 Q Right. Let's turn to the next page. All right. So let's
15 look at that first bullet point and this is -- this is
16 Rich Judge writing to you. We anticipate redistricting is
17 coming in the next couple of weeks with maps being released
18 possibly today or the next few days. So at the time this was
19 written, nobody had seen any maps yet.

20 A Not to my knowledge. I mean, you know, of course the rumor
21 mill in the Capitol is people start talking with one another
22 and you start getting rumblings that perhaps something's going
23 to be sprung upon you, so you begin to prepare immediately,
24 and, you know, based on what you're hearing though what we call
25 the grapevine of people talking to their colleagues and people

1 overhearing things being said. So during that period we were
2 getting some rumblings that they might try and spring something
3 on us and also it was during the period when the recalls were
4 going on and we were hearing rumors that they wanted to quick
5 rush something through before the recall so in the event that
6 they lost the majority.

7 Q So the rumors were flying thick?

8 A Right.

9 Q All right. So we continue with this, with this exhibit and
10 the third bullet point. Well, actually let's do the second
11 bullet point. We'll do it in order. All right. We anticipate
12 that the map they are going to put out -- they being the
13 Republicans; right?

14 A Yeah.

15 Q We anticipate that the map they're going to put out, given
16 their need to pass it before the locals are done with their
17 ward maps, is going to include political gerrymandering. Do
18 you see that?

19 A Yes.

20 Q Now, Rich Judge wrote that to you before he saw any maps?

21 A Right.

22 Q This is all just rumor.

23 A Just based on rumors.

24 Q All right. So let's look at the next bullet point. Our
25 message, our message -- well, that would be the Democrat

1 caucus; is that correct?

2 A Right.

3 Q Our message is the process and the map is unconstitutional,
4 political and partisan. Those are on the lines. That's
5 important to you and Rich Judge?

6 A Right.

7 Q It's not in the best interests of residents?

8 A Correct.

9 Q And Rich Judge, well, he hasn't seen the map either, has he,
10 because it hasn't been released.

11 A No, only the rumors.

12 Q So you can't -- is he in a position to judge the
13 constitutionality of the map on rumor?

14 A No, only just based on what he had heard and the concerns
15 that were being provided at that time.

16 Q All right. Well, he says it's political. Well, that's --
17 it's a political process, isn't it?

18 A Yes.

19 Q And the redistricting map is a political act?

20 A Yes, that's correct.

21 Q And the political act involves the judgment of the
22 legislators. Yes?

23 A Correct.

24 Q And those would be the legislators who represent the people
25 of the state of Wisconsin.

1 A Correct.

2 Q In their legislature duly assembled to give legitimacy to
3 the decisions that they make because they are the
4 representatives of the government who are giving their consent;
5 is that right?

6 A That's right.

7 Q All right. Now, let's go on to next bullet point.
8 All right. It says we will be meeting as a caucus to talk
9 strategy. We will need to keep our caucus strategy
10 confidential. Do you see that?

11 A Yes, I do.

12 Q I understand there was some concern expressed earlier about
13 some secrecy agreements. This is Rich Judge telling you you
14 need to keep your caucus strategy confidential. Yes?

15 A That's correct, although I certainly want to draw the
16 distinction between a strategy of whether you're going to offer
17 amendments or not offer amendments versus letting the public
18 know exactly what the substance is that you're attempting to
19 accomplish. There's quite a distinct difference there.

20 Q There is. Let's go to the next bullet point. It's actually
21 not the next one in line but the one that starts -- I'm sorry,
22 the one that starts remember. If we could highlight that one.

23 A Right.

24 Q All right. So there's a difference in secrecy when you're
25 developing strategy to pass a map or your legislative strategy

1 and something else. So here's your strategy. Remember, we
2 will not be passing a map.

3 A Right.

4 Q Everything we do is about positioning both from a message
5 and legal perspective.

6 A Mm-hm.

7 Q And that's what you wanted to keep secret.

8 A Well, the strategy would be whether or not we would offer a
9 map, whether or not we would offer amendments, and that, of
10 course, is something you don't -- typically don't share what
11 your strategy is going to be. And we're not passing that
12 meaning that up until that point I think we had 400 and some
13 amendments and the Republican side had not adopted any. So we
14 knew that they in all likelihood were not taking into account
15 our point of view.

16 Q And was it the Democratic caucus's position that they would
17 throw their hands in up defeat before any legislation has
18 actually been introduced?

19 A No, because first of all, at that juncture we didn't know if
20 they would, when they'd offer it and when they would pass it.
21 So we just were at that point trying to speculate. I mean,
22 given the nature of the way 2011 had transpired with the
23 governor and, you know, springing upon the public after the
24 election he was going to close down all collective bargaining
25 and he wanted it passed in six days and given so much of what

1 had transpired, we were worried that they would do what
2 ultimately they did, although we didn't know they would do
3 this, which is introduce a bill and seven days later roughly
4 you'd pass it into law.

5 Q That would be 12, I think, right?

6 A From when it became public, yes. From when it was
7 introduced on the 11th until it passed was I think eight days.

8 Q All right. So -- but before any legislation had hit the
9 floor, before it had even circulated, before it had been
10 offered, the Democratic Assembly caucus' strategy secret was
11 we're going to posture. We're not going to pass a map.

12 A We were saying that we doubted the Republicans would pass
13 our map. It would be quite amazing if they would even pass an
14 amendment, much less a map that we would offer.

15 JUDGE STADTMUELLER: Mr. Kelly, we have reached that
16 point where it's time to take our afternoon break. If I may
17 stand in recess for 15 minutes and we'll pick up with the
18 balance of Representative Barca's testimony at 2:00 o'clock.

19 THE BAILIFF: All rise.

20 (A recess was taken.)

21 JUDGE STADTMUELLER: Mr. Kelly, you may continue with
22 your questions.

23 MR. KELLY: Thank you, your Honor.

24 BY MR. KELLY:

25 Q Now, let's see where we were. Oh, yes. Could we move up to

1 the second bullet point on this page. All right. So this
2 says, Mr. Barca, do you see, please make sure there is no
3 discussion of what Democrats might do with anyone, especially
4 press?

5 A Mm-hm.

6 Q Do you see that?

7 A Yes, I do.

8 Q That was -- that was your position that you needed to keep
9 secret what the Democrats might do from the press?

10 A I want to make sure we're clear from the strategy point in
11 terms of what amendments we might offer. Again, there's a
12 clear distinction between we -- as you can see from the bottom
13 couple points, we wanted the public to have access to the
14 information, we wanted to reflect public input, we wanted to
15 make sure that a map was constitutional. We weren't trying to
16 hide from the public the facts and the information, just the
17 strategy is a clear distinction I'm sure you would recognize.

18 Q And that strategy was we're not passing any maps, we're just
19 posturing.

20 A No, not that -- the strategy was that to remind people,
21 because oftentimes people can think that, well, maybe the
22 Republicans actually will pass something this time and we felt
23 pretty confident they wouldn't pass anything we offered. I at
24 times will go to them trying to get them to offer an amendment
25 and say don't pass Democratic amendments.

1 Q All right. So the next bullet point, in order to have the
2 best chance, we will need to have the unified strategy with
3 Senate Democrats. We will need to coordinate so we don't want
4 to be commenting and speculating on problems with the GOP map
5 prematurely. Do you see that?

6 A Yes, I do.

7 Q Now, I want you to turn back two pages. And what we see
8 here and on most of the next page is a call list. Yes?

9 A Yes.

10 Q And these were other members of the Assembly caucus.

11 A Yeah.

12 Q That were being called to give them the talking points?

13 A Correct.

14 Q And all before anyone had seen any maps.

15 A Right, and in particular because of the fact that rumors
16 were running rampant and different members had relationships
17 with Republicans on the other side of the aisle and they want
18 to make sure that they weren't commenting on information that
19 might be completely inaccurate, because obviously at that point
20 nobody had officially seen any maps but they might have
21 overheard a conversation or a Republican might have said "I'm
22 concerned about what I see with my district" or something of
23 that sort.

24 Q So you were concerned with accuracy?

25 A We wanted to make sure that a number of things. First of

1 all, that people weren't commenting on something that we had no
2 idea if that would be what the map was or not; and secondly,
3 with, you know, until we actually had the information before
4 us.

5 Q So you wanted to be accurate?

6 A Right.

7 Q So let's go to the third page, the fifth bullet point. So
8 here's what you told them with respect to that accuracy. We
9 need to stick to the bigger picture message. The GOP map is
10 yet another abuse of power. The map is unconstitutional,
11 divisive and a blatant attempt to reduce the accountability and
12 secure political advantage for Republicans, all before you saw
13 the map.

14 A That's what we were hearing, that they would pass something
15 that, you know, would be very highly partisan and would not
16 necessarily respect the community interest, and I know that
17 some of the minority caucus members were concerned with what
18 they were hearing what happened to their districts.

19 Q And this is based on the rumors you'd heard?

20 A That's correct.

21 Q Isn't that sometimes known as rumor mongering, Mr. Barca?

22 A Well, there's no word telling people not to rumor monger,
23 not to go out and say things, because then we would be
24 perpetuating rumors.

25 Q Here's your message. It says -- this is the message that

1 you gave. The GOP map is yet another abuse of power and so on
2 and so forth. That's your message, before you saw it, based on
3 rumors.

4 A Yeah. We were very worried, again, that they would do
5 exactly what they did, which is spring it upon us and with very
6 little time and try and ram it through the process without much
7 public input or without us having a chance to really adequately
8 respond, and that's exactly what happened ironically.

9 Q Ironically. But what you weren't worried about is the
10 accuracy of the message that you were getting out to your
11 members.

12 A Well, as you know, this is -- we were telling people we
13 thought could happen, what we projected very well might happen,
14 which did, in fact, come true. But we were telling people
15 let's not go out and talk to the press and perpetuate rumors.
16 Let's wait until we see the maps.

17 Q Now, Mr. Barca, you and I talked about all the things that
18 the Assembly Democratic caucus did with respect to
19 redistricting in the period between the beginning of January
20 when the bill eventually passed. Do you remember that?

21 A Yes.

22 Q Okay. So I asked you, and if you recall, tell me everything
23 that you all did with respect to redistricting between
24 January 4, 2011 and July 11, 2011 to address the topic of
25 redistricting. And you said, well, it's in the record that we

1 met, we went to leg counsel. That would be legislative
2 counsel; correct?

3 A Correct.

4 Q And we sent a letter, and that letter was sent to the
5 Republican leadership?

6 A Yes. We sent a couple of letters to the Republican leaders,
7 first of all asking that they reconsider their -- their
8 provisions they had passed to give themselves unlimited access
9 to attorneys and experts and not allow that for anybody else
10 besides the Republican caucus, and so that's correct and I
11 think there was a letter sent a number of months later. So
12 there was a number of them.

13 Q So you got a couple of letters, and if you'll recall I asked
14 you what else, if anything, did the Democratic caucus do about
15 redistricting in that time period, and you said, well, we
16 provided updates, you know, to our members in terms of anything
17 that we knew. Do you remember that?

18 A Yes, I do.

19 Q And that was the sum total of what you told me about what
20 the Democratic caucus did between January 4th and the passage
21 of the bill with respect to redistricting.

22 A I don't recall exactly what time frame you outlined at that
23 time, but anyway.

24 Q Well, let me back up and I'll read the question that I asked
25 you. So tell me everything that you did or that you know that

1 the Democratic caucus and either the Assembly or the Senate did
2 between January 4, 2011 and July 11, 2011 to address the topic
3 of redistricting, and those were the things you gave me.

4 A Okay, very good. You read the record there so I'm sure
5 that's true.

6 Q So you -- you didn't call any public meetings at any time in
7 that period of time to address redistricting?

8 A No, we did not.

9 Q You didn't go have your members go out and start canvassing
10 the people they represent to find out their impressions and
11 their ideas with respect to redistricting?

12 A No. I mean, although I'll tell you, that was certainly our
13 intent after the ward maps were passed we certainly were
14 looking to do that. But as I indicated, between January 4 and
15 June 30, you know, we had our hands full with dealings with the
16 agenda that was before us and we were anticipating the calendar
17 that was provided to us that this would come about in the late
18 summer or fall. So up until July 1st, you know, we weren't
19 hearing that they were going to fast forward this.

20 Q Everybody had their hands full; right?

21 A Everybody what?

22 Q Everybody had their hands full, Democrats, Republicans.

23 A Yes, we did, although we didn't have hundreds of thousands
24 of dollars like they did to hire outside counsel and have them
25 be, you know, had enough money for firms like yours that could

1 work around the clock on this. As legislators with -- we were
2 focused on our agenda. Outside experts, of course, have the
3 luxury of being able to focus on other things.

4 Q It wasn't my firm.

5 A No, I understand. Firms like yours.

6 Q Fair enough. Well, it wouldn't have cost you any money to
7 call a public hearing; right?

8 A Correct, and we undoubtedly would have done that had they
9 followed the process that we expected.

10 Q So you were just caught off guard.

11 A To some degree caught off guard and also, as I indicated, we
12 were focused on other issues.

13 JUDGE STADTMUELLER: How about sandbagged?

14 THE WITNESS: It's another way of describing it.

15 JUDGE STADTMUELLER: Fair.

16 BY MR. KELLY:

17 Q And once you did find out that it was coming along, you
18 didn't call any emergency town hall meetings?

19 A No. I mean, obviously, my timeline again with, you know, we
20 were hearing right after the budget passed around the 31st in
21 that period, we were starting to hear rumors that they may come
22 forward with something, and, you know, eight days later the
23 draft versions came out and the whole thing was completed by
24 the 20th. So it would have been very difficult to call an
25 emergency public hearing, but until you actually had the maps

1 on the 11th, the 11th to the 20th is nine days. That doesn't
2 allow much time to even reserve halls and get the word out to
3 people, but --

4 Q But you didn't do that. It might have been difficult but
5 you didn't do it.

6 A That's correct, we did not.

7 Q But you could have?

8 A We could have.

9 Q If you wanted.

10 A That's right.

11 Q All right. Let's take a --

12 A I'm not sure what kind of input we would have gotten. If
13 you just call a hearing and you don't have anything to be able
14 to put in front of them, it makes it more difficult. Because
15 when you have hearings, you at least have a draft bill,
16 proposed ideas on what you're going to bring forward.

17 Q Well, you never know until you try. Let's take a look at
18 Exhibit 1055. Have you ever seen this before, Mr. Barca?
19 Let's -- okay, there we go. Can you see that easily enough,
20 Mr. Barca?

21 A Yes, I do.

22 Q Okay. Do you recognize that as being the legislative
23 history for Senate Bill 148?

24 A Yes, I do.

25 Q And Senate Bill 148 was the redistricting legislation that

1 was entered, introduced in the Senate?

2 A That's correct.

3 Q All right. Eventually that made its way to the Assembly.
4 Yes?

5 A That's right, that's right.

6 Q Okay. All right. Let's turn to the third page of the
7 exhibit, because the Assembly Democrats did have input in the
8 redistricting process eventually, didn't they?

9 A Well, it depends on what your definition of input is.

10 Q My definition is an amendment was offered by the Democrats.
11 Yes?

12 A Yes. There was an amendment offered in terms of the process
13 that would be utilized, you know, for the past number of years.
14 There's been a lot of interest by what we call the big
15 government groups in trying to have sort of Iowa model that is
16 a nonpartisan redistricting process. So yes, that would be a
17 different approach to take in redistricting as opposed to,
18 let's say, an alternative to specific maps that are offered.

19 Q Okay. Let's take a look at the -- excuse me -- the
20 paragraph beginning July 20, 2011.

21 A Yes.

22 Q All right. So this says that the Assembly substituted
23 Amendment 1 to 2011 Senate Bill 148 offered July 20, 2011 by --
24 well, a whole list of people beginning with Representative
25 Hulsey?

1 A Yes.

2 Q And the third person on that list is you; is that right?

3 A Yes. If you mean sponsors were Representative Brett Hulse
4 and Representative Mark Pocan and they list everybody
5 alphabetically after that.

6 Q Okay. Now, those are all Democratic legislators on that
7 list?

8 A Yes, it is.

9 Q Are there any Republicans on there at all?

10 A No, there are none.

11 Q You didn't seek out Republicans to join you in that bill?

12 A I'm not -- I don't know if Representative Hulse
13 sent out a cosponsorship memo or not.

14 Q You didn't though.

15 A No. It wasn't my amendment.

16 Q But you're a cosponsor.

17 A That's correct. So whenever he'd send a cosponsorship memo,
18 I would have added my name.

19 Q And as it says, it's offered by Representatives Hulse
20 Pocan, you and a whole list of others.

21 A That's correct.

22 Q All right. Let's take a look at what this is -- just
23 substitute Amendment 1. We did. This was your proposal.
24 Section 2 on the third page of the exhibit. Let's go to the
25 next. Fourth page, I'm sorry. Are you on 1055?

1 A Are you asking me?

2 Q No. There we go. Let's look at 4.006, sub 2, if we could
3 highlight that. So it says not later than January 1 of the
4 second year following the decennial federal census, the
5 Legislative Reference Bureau and the Government Accountability
6 Board shall jointly deliver to the majority leader of the
7 Senate and speaker of the Assembly identical bills creating
8 plans of legislative and congressional redistricting, prepared
9 in accordance with standards developed by the Legislative
10 Reference Bureau and the Government Accountability Board under
11 subsection 1. Do you see that?

12 A Yes, I do.

13 Q All right. So your proposal was to take the responsibility
14 for redistricting out of the hands of the legislature and give
15 it to the Government Accountability Board.

16 A Mm-hm. This proposal would do that. It would adopt
17 essentially the Iowa model, that's correct.

18 Q And who elects the members of the Government Accountability
19 Board?

20 A Nobody. They're appointed by the governor. They're
21 appointed by the governor subject to confirmation by the State
22 Senate.

23 Q Now I want to return to our conversation earlier. We were
24 talking about the importance of a representational form of
25 government.

1 A Yes.

2 Q And we -- that important matters of policy gain their
3 credibility and their legitimacy from the consent of the
4 governed as expressed by their elected representatives. Do you
5 remember talking about that?

6 A Yes, I do.

7 Q All right. But this redistricting, that's an important
8 policy issue, isn't it, Mr. Barca?

9 A Yes, it is.

10 Q But what you wanted to do was take it out of the people's
11 representatives' hands and put it in an unelected bureaucracy's
12 responsibility; is that right?

13 A Well, I wouldn't depict it that way at all. Under the Iowa
14 model and other models that other states have adopted, the idea
15 behind it gives citizens much more input and involvement where
16 they have hearings around the state, they've collected input
17 from people and then they bring forward what's called a
18 nonpartisan bill so that you're collecting input from those
19 people. But eventually the legislature does have to either
20 vote for it or vote against it. So if it's not something that
21 the legislature believes is constitutional or appropriate, then
22 they are free to vote it down.

23 Q Well, let's take a look and you tell me where we find the
24 provisions in this amendment for all of these public hearings
25 where the public would have input into the map that the GAB was

1 developing. Where do I find that?

2 A I don't -- you know, I'd have to read through the bill more
3 carefully. I don't know if it's actually outlined in that
4 manner, but it's commonly understood when you follow models
5 that Iowa and other states who have adopted more recent
6 nonpartisan approaches that they have public input processes
7 built into that mapping process. So that would be the
8 expectation were the legislature ultimately to adopt this kind
9 of a process.

10 Q But this amendment that you cosponsored doesn't have any
11 provision for public hearings.

12 A I'd have to read it more carefully to be able say it but
13 I don't believe -- you probably are accurate.

14 MR. KELLY: One moment, please. I forgot to put
15 these on the witness stand prior to the examination. With your
16 leave I'll do that, your Honor.

17 JUDGE STADTMUELLER: All right.

18 THE WITNESS: You want me to read these?

19 BY MR. KELLY:

20 Q Well, let's do this. I'd like you to find in there
21 Exhibit 1055.

22 A Okay, I have it in front of me now.

23 Q Please read through that and tell me where we will find the
24 provision for providing for all of these public hearings.

25 JUDGE STADTMUELLER: And again with all due respect,

1 Mr. Kelly, I'm not sure what the relevance of any of this is to
2 the issues that are before the Court, and we are wasting time
3 because as everyone in this courtroom knows, this case is
4 coming to an end tomorrow evening. So if this is the way you
5 and your colleagues want to spend your time, you're going to be
6 cutting yourself all very short with regard to the balance of
7 the witnesses to be called and the arguments of counsel.

8 So you're going to have to decide collectively how
9 you want to use the balance of the time, because we're at a
10 point with Representative Barca's testimony, while this is all,
11 indeed, very interesting, it really in the final analysis
12 doesn't have an awful lot to do with the issues that are
13 currently before the Court.

14 MR. KELLY: Well, thank you, your Honor, and the
15 reason I was going through it was to address the Court's
16 expressed concerns about the process that led to Acts 43 and
17 44, but if that's not an issue that's important to the Court,
18 I'll be happy to move a little more fast.

19 JUDGE WOOD: If you could move on.

20 MR. KELLY: Thank you.

21 BY MR. KELLY:

22 Q All right. So let's -- instead of having you spend your
23 time looking through the -- these provisions for public
24 hearings, I'll represent to you that there are none. So then
25 let's do this. So following along from where we were at before

1 on the fourth page of this exhibit, next page, please. I count
2 differently apparently. So it says either -- we're up in the
3 first paragraph.

4 A Yes.

5 Q Sub 1. So now once the GAB gets done writing the map, your
6 proposal is that either the Assembly or the Senate shall
7 expeditiously introduce and bring a bill to a vote not less
8 than seven days after the date of introduction and the vote
9 shall be under a procedure or rule permitting no amendments
10 except those of a purely corrective nature. Do you see that?

11 A I see that.

12 Q Okay. Now, I understand that it's your position that you
13 would have liked to have seen that language amended.

14 A That's correct. Yes, in my deposition I stated such.
15 I assume that's before the Court already.

16 Q But nonetheless, your name was on this bill and that's what
17 got introduced. All right. Now, I would like to turn your
18 attention to Exhibit 1068, and for purposes of expediting
19 matters, I'll represent to you that this is the bulletin of the
20 proceedings of the Wisconsin legislature, 1983-1984 session.

21 Mr. Barca, were you aware that in 1983, which was the last time
22 that the legislature passed a redistricting statute and it was
23 signed by the governor, that that was 1983? Did you know that?

24 A I believe I've been made aware of that through this process.

25 Q Okay. And in 1983, did you know that the Assembly had a

1 majority of Democrats?

2 A I'm aware that that was the case. I wasn't elected then but
3 that was the term before I got there, but I was aware that
4 there was a Democrat majority.

5 Q So in the Senate, the Senate had a majority of Democrats as
6 well; is that right?

7 A Yes, I believe that's correct.

8 Q And in 1983 the governor was a Democrat.

9 A Correct.

10 Q Now, are you aware that in 1983 the legislature introduced,
11 passed, signed a redistricting legislation in four days?

12 A I was not aware of that.

13 Q Were you aware that they held only one public hearing on
14 that bill?

15 A No, I was not aware of that. You know, again, I was in the
16 legislature when we did the redistricting in the nineties, so
17 I'm much more aware of that during that period. So I was not
18 aware of that, but could very well have been the case.

19 The other issue I would say, though, like in the nineties,
20 for instance, when I was there, I know that there were other
21 competing bills, there were hearings on other competing bills
22 before the bill had ultimately passed, did pass. So I don't
23 know if this was the only bill offered and it was similar to
24 the process followed here. I'm sure there were no secrecy
25 oaths, but beyond that, I don't know if there were other bills

1 that were considered during that same time period or not.

2 MR. KELLY: Your Honor, we are interested in
3 expediting the process, and in that spirit I would like to
4 offer that the Court would receive Exhibits 1057, 1068, 1069,
5 1070, and 75, all of which are legislative history or bills for
6 the bluebook. And if we can do that, I can dispense with
7 further questioning of Mr. Barca.

8 JUDGE STADTMUELLER: Well, again, subject to the
9 Court's comments earlier today on the whole notion of relevance
10 to the issues that are before the Court, namely the
11 constitutionality of certain provisions, some of which we have
12 learned quite a bit about today, I see no problem with the
13 Court receiving those exhibits and we will give them
14 consideration as may be appropriate.

15 MR. KELLY: Thank you, your Honor. No further
16 questions. Thank you, Mr. Barca.

17 THE WITNESS: Thank you very much.

18 MR. BROWN: And we have no redirect.

19 JUDGE STADTMUELLER: Thank you, Representative Barca.
20 I appreciate your taking the time to contribute to the Court's
21 decision-making process. You may call your next witness or
22 recall Dr. Mayer as the case may be.

23 MR. POLAND: Thank you, your Honor. The Baldus
24 plaintiffs recall Dr. Mayer to the stand.

25

1 KENNETH MAYER, PLAINTIFF WITNESS, PREVIOUSLY SWORN

2 JUDGE STADTMUELLER: Dr. Mayer, you may assume you're
3 under the same oath that you took earlier when you began your
4 testimony.

5 THE WITNESS: Yes, your Honor.

6 JUDGE STADTMUELLER: Mr. Poland, you may continue
7 with your questions. Does the witness have all the exhibits
8 before him?

9 MR. POLAND: I think he does, your Honor.

10 DIRECT EXAMINATION (Continued)

11 BY MR. POLAND:

12 Q Dr. Mayer, have you reviewed Act 43 for purposes other than
13 how it treats Latino and African-American districts?

14 A Yes, I have.

15 Q And for what purposes have you reviewed it?

16 A I reviewed Act 43 in terms of its compliance with
17 traditional redistricting principles. In addition to equal
18 population I looked specifically at population movements, core
19 district retention, disenfranchisement and municipal splits.

20 Q You just mentioned a number of different things. Is that
21 what you were referring to when you used the term
22 "redistricting criteria"?

23 A Yes, in terms of what I looked at. There are some others
24 but that's what I focused on.

25 Q Where does one find these traditional redistricting

1 criteria?

2 A They -- depending on the state that one is in, they emerged
3 through the jurisprudence on redistricting that emerged after
4 the initial decisions in the 1960's in what's commonly known as
5 the Reapportionment Revolution, and these are standards that
6 the courts have fleshed out in terms of what -- what is
7 expected and what is considered the appropriate means of
8 conducting redistricting, in addition to the quantitative
9 requirement for equal population.

10 Q And you mentioned around the country. How about in
11 Wisconsin, where does one find these traditional redistricting
12 criteria?

13 A Some of them are in the constitution. Some of them are in
14 statutes. A number of them were elucidated in the 2002
15 Baumgart decision, which set out a number of standards. In
16 particular the constitution, Wisconsin constitution refers to
17 county ward, precinct or towns. There are a number of other
18 types of municipalities in the state, including villages,
19 townships, cities, and the Baumgart Court made clear that they
20 interpreted this language to apply to municipalities generally.

21 Q We'll get into each of the redistricting criteria that you
22 looked at specifically in a little more detail, but first let
23 me just ask you generally why did the traditional redistricting
24 criteria matter?

25 A The redistricting criteria, in addition to the other

1 standards in Wisconsin, which are contiguity and compactness,
2 have to do with preserving the integrity of the
3 representational structure of geographically based districts.
4 For example, if one's only concern was equal population, it
5 would be possible, in fact, it would be -- with modern
6 computers it would be relatively trivial task to construct a
7 perfectly ideally populated district that ran from the Illinois
8 border all the way up to the northern edge of Wisconsin that
9 met the population equality of 57,444 for assembly districts,
10 but there's no possible way that that could be considered a
11 meaningful district in terms of representation of communities
12 of interest, the ability of a representative to travel around
13 and to facilitate contact with his or her constituents.

14 And so these other standards have the effect of giving some
15 flesh and bones to the fundamental basis of the equal
16 population, which is to ensure equal voting and equal
17 representation.

18 Q Dr. Mayer, when you reviewed Act 43, did you identify any of
19 the traditional redistricting criteria that were particularly
20 important to your opinions in this case?

21 A Yes, I did. In looking at core district retention, I
22 examined not only the specific statistics of core district
23 retention but also the population movements that were
24 implemented in order to achieve a net population shifts up or
25 down necessary to bring Assembly and Senate districts into

1 rough equality.

2 I examined disenfranchisement, which in Wisconsin occurs
3 because we have staggered Senate elections in which even
4 senators from even numbered district are elected in
5 presidential election years and senators from odd numbered
6 districts are elected in midterm years. And during
7 redistricting which occurs in 2011, early 2012, individuals who
8 are moved from an even district into an odd district lose their
9 right to vote in the 2012 Senate elections and they go six
10 years between Senate elections.

11 I also paid careful attention to municipal splits, not just
12 in terms of the total number of splits but focusing on the
13 particular set of examples that I concluded had no
14 justification that I could ascertain.

15 Q Dr. Mayer, let's start with core district retention. What
16 does that term mean?

17 A As I mentioned earlier, core district retention is a measure
18 of the percentage of the population of a previous district that
19 is retained in a new district, and so it's a number between
20 zero and 100 that simply reflects the percentage of the
21 individuals who are preserved in the core of the existing
22 district as the boundaries are changed and as the districts are
23 reconfigured.

24 Q Why is any population movement at all necessary as part of
25 the redistricting process?

1 A Well, it's because the population changes that occur in the
2 decade after the previous redistricting people migrate, people
3 are born, people die, people move into the state, out of the
4 state, and all these population shifts invariably mean that the
5 differences in population that occur over the succeeding decade
6 always render the existing districts as having an unacceptably
7 high population deviation in terms of some districts having far
8 more people than other districts, and the deviations can be as
9 high as 50, 60, 70 percent, particularly when some parts of the
10 state grow faster than others or some parts grow and others
11 shrink.

12 Q So it's necessary to rebalance the population after a new
13 decennial census?

14 A Always.

15 Q Dr. Mayer, as a general rule, how many people should be
16 moved as part of equalizing population?

17 A Well, there's no specific threshold, but the general idea is
18 that you move people as necessary and that's in the interest of
19 preserving the core of the previous districts that you don't
20 move people arbitrarily or capriciously, which has the effect
21 of disrupting relationships between constituents and their
22 representatives and representatives and their constituents.

23 Q Dr. Mayer, what did you do to examine core district
24 retention under Act 43?

25 A Relied on reports that were generated by the mapping program

1 autoBound, which will produce a set report, it's one of the
2 standard reports that the program produces, which tells you for
3 each Assembly district or Senate district which pieces of old
4 districts are shifted into the new district, and from that it's
5 possible to calculate the percentage of the old districts that
6 are retained in the new district. And most of the time that's
7 a straightforward calculation. There are times when it can
8 become more complicated, but usually it's straightforward.

9 Q Have you performed or prepared a summary of the analysis
10 that you performed of core district retention in Act 43?

11 A Yes, I have.

12 Q Dr. Mayer, I'd like to turn your attention to Exhibit 55 and
13 the Table 1 in your Exhibit 55.

14 A It's Exhibit 2 to my expert report.

15 Q Exhibit 2 in Exhibit 55. Thank you. Dr. Mayer, could you
16 please explain the analysis that you performed that's portrayed
17 in Exhibit 2 to your expert report.

18 A This is a table that shows for each Assembly district
19 denoted in column 1, which is the number of the assembly
20 district, column 2 is the population of the 2002 districts
21 based on the census and taken in 2010. Column 3 is the
22 population shift that would be required to bring the 2002
23 districts or to change the 2002 districts to bring them into
24 exact compliance with exact population equality of 57,442 --
25 444. It's not necessary to achieve exact population equality.

1 Table 4 shows the actual population change that occurred in
2 each of those districts as the result of Act 43.

3 Tables 5 and 6 shows how that net population change was
4 achieved by showing the number of people who were added to a
5 district. Column 6 shows the number of people that were taken
6 out of or shifted out of a district into a different district.
7 Those two numbers added together produce the number in
8 column 6, which is the total population shift.

9 In column 7 I divided the total population shift by the
10 population shift that would have been required to create exact
11 population equality, which produces a ratio, the number of
12 people who were shifted. A ratio that -- a ratio of one
13 indicates that the same number of people were shifted in and
14 out as was necessary to achieve population equality, and the
15 larger that number gets, it signifies that more and more and
16 more people were shifted in and out as was necessary to achieve
17 population equality.

18 Q Dr. Mayer, after performing the analysis that is set forth
19 in Exhibit 2 to your expert report, did you reach any
20 conclusions?

21 A Yes, I did.

22 Q And what conclusions did you reach?

23 A My conclusion was that far more people were shifted in and
24 out of districts than was necessary in order to achieve
25 occupation population equality. Over all for all assembly

1 districts it was approximately 50 times as many people moved as
2 was necessary, but there are some particularly notable examples
3 where the population shifts were wildly out of proportion to
4 what was required.

5 Q Can you tell us what those examples are?

6 A So if we could highlight Assembly District 24. Right there.
7 So this is a district that was underpopulated by 379 people;
8 217 people were added. So this district was probably close
9 enough to the ideal district population that it could have been
10 left alone, but the map drawers added 217 people to the
11 district. They achieved that as seen in column 5 by moving
12 29,936 people into the district, moving out of the district
13 29,719 people, for a total population shift of 59,655, which
14 was 275 times as many people as was necessary in order to
15 achieve population equality.

16 If we continue down the table to Assembly District 60, which
17 is on the next page, Assembly District 60 was underpopulated by
18 ten people, which is essentially a population deviation of
19 zero. So it could have been left entirely alone. The effect
20 of the redistricting had the effect of removing 49 people from
21 the district, thereby taking it farther away from the ideal
22 population. This net population decrease of 49 people was
23 achieved by moving 17,595 people into the district, moving
24 17,643 out of the district, for a total population shift of
25 35,237 people, which was 719 times as many people as was

1 necessary. And then if we move down to --

2 Q Dr. Mayer, if I could interrupt you before you go on. With
3 the example that you gave of Assembly District 24, have you
4 seen any justification for the kind of population movement in
5 Assembly District 24 that you testified to?

6 A I have not.

7 Q Have you seen any justification for that kind of large
8 population movement?

9 A I have not.

10 Q Please continue.

11 A If we go down to Assembly District 97, which is at the
12 bottom of this page, Assembly District 97 was underpopulated by
13 145 people. So to bring it into exact population equality the
14 map drawers would have had to add 145 people. The actual
15 redistrict in 97th Assembly District subtracted 20 people. So
16 again, it was a net change of virtually zero. They achieved
17 this change by adding 13,524 people into the district, shifting
18 13,544 people out of the district, for a total population shift
19 of 27,068 people, which was more than 1300 times as many people
20 as was necessary. And, in fact, that number could very well
21 have been infinite because the actual population shift could
22 well have been zero.

23 Q Have you seen any justification for that kind of a
24 population shift, Dr. Mayer?

25 A I have not. I should say that in reviewing the depositions

1 of the people who indicate that they drew the maps, they said
2 that their only concern as far as populations was equalizing
3 population. But I -- other than that, which I don't see as a
4 justification for this degree of population shifts, I see
5 nothing else.

6 Q Dr. Mayer, did you perform the same analysis for Senate
7 districts?

8 A Yes, I did.

9 Q And are those set forth in your expert report as well?

10 A They are in Table 3.

11 Q That would be Exhibit 3 on the next page?

12 A Exhibit 3, that's correct.

13 Q Which Senate districts did you examine for the population
14 shift?

15 A I looked at them all. The ones I would like to focus on are
16 the 2nd Senate district, which was underpopulated by -- well,
17 actually the signs in this table are reversed, so the minus
18 sign indicates that it was underpopulated. In the actual
19 population change a minus sign indicates a population was
20 added. The 2nd was underpopulated by 286 individuals. They
21 added, map drawers added 414, and I'll skip to the chase. The
22 total population shift was nearly 99,000, more than 300 times
23 as many people as was necessary.

24 Q Dr. Mayer, have you seen any justification for the
25 population movement in Senate district 2?

1 A I have not. Another example is Senate District 17, which
2 was actually over populated by 58 people. I'm sorry, yes,
3 overpopulated by 58 people. The actual map subtracted 159
4 people -- no, it added a 159 people to it. No, subtracted 159
5 people and achieved that by moving 39,173, for a population
6 shift of change ratio of nearly 700.

7 The other notable pattern occurred in the 21st and 22nd
8 Senate districts which Representative Barca testified, this was
9 the reconfiguration of those districts, and in the 22nd Senate
10 district, for example, it was only necessary to subtract 7,686
11 people. That shift was achieved by adding 66,837 people, and
12 I should note that all of these population changes between the
13 21st and the 22nd occurred only between those two districts.
14 The configuration of the two districts together did not change.

15 And in Senate District 22, there were 74,586 people moved
16 out. These were all moved into the 21st Senate district,
17 thereby losing their right to vote in 2012, which represents a
18 total that is 18.4 times as large as the population shift
19 required. Similar calculation for the 21st shows that the
20 population shift was 25 times as large as was necessary.

21 Q Dr. Mayer, have you seen any justification for the
22 population shifts in Senate District 17 or in 21 and 22?

23 A In 17 I have not. The only justification offered in the
24 evidence that I examined for 21 and 22, Senate Districts 21 and
25 22 was the desire of the map drawers to place the cities of

1 Racine and Kenosha into the same Senate district.

2 Q Did you -- were you present before for Representative
3 Barca's testimony?

4 A Yes, I was.

5 Q And did you hear his testimony about Racine and Kenosha
6 being in the same Senate district?

7 A I did.

8 Q Do you have any opinions about Racine and Kenosha being in
9 the same Senate district?

10 A I agree with Representative Barca. I was able to form my
11 own impressions as the result of the work I did in the
12 litigation between -- for the city of Kenosha. I spent a good
13 deal of time speaking with the elected leaders, members of
14 Common Council and other people in the city, and they simply do
15 not see themselves as having anything in common with the city
16 of Racine. There's quite a bit of rivalry.

17 MR. KELLY: Your Honor, excuse me. I'll object to
18 that based on hearsay. He's not a representative.

19 MR. POLAND: I believe experts can rely on hearsay,
20 your Honor.

21 JUDGE STADTMUELLER: Certainly, and again, subject to
22 the Court's earlier admonition about this sort of thing, there
23 is bit of a distinction with Dr. Mayer, because as Mr. Poland
24 correctly notes, he is entitled to rely on matters that serve
25 as the foundation for his opinions. So it is all noted and

1 will be duly considered as appropriate.

2 MR. POLAND: Thank you, your Honor.

3 BY MR. POLAND:

4 Q Dr. Mayer, after reviewing the core district retention of
5 Assembly and Senate districts under Act 43, have you reached
6 any opinions?

7 A Well, I should say that in addition to the population
8 shifts, I did perform the calculations which calculated the
9 actual population core retention for each of the districts,
10 some of which is shown in Exhibit 4 to my report, Exhibit 55,
11 but there are also some corrections that I made, which I don't
12 know which exhibit they are. I'll find it in a moment. I did
13 go back and revisit these calculations because I concluded --

14 Q Is that Exhibit 1020, Dr. Mayer?

15 A Yes. After seeing, reviewing Professor Gaddie's report, the
16 calculations and noting that his numbers for core district
17 retention were very different than mine in a number of
18 districts, I investigated and spent some time trying to assess
19 whether I had done these calculations correctly. Usually this
20 occurs when there is a significant change or sometimes
21 districts are renumbered and then you don't have a core
22 population from an old district of the same number and you have
23 to examine them to see which was the largest population core
24 that existed and these show my spreadsheet which went through
25 and looked at each of the cases where my numbers and

1 Professor Gaddie's numbers were different and assessment of
2 which -- which number was correct. Sometimes I concluded that
3 Professor Gaddie was correct, sometimes I concluded that my
4 calculations were correct, and my handwritten notes about why
5 I had reached the conclusion about which numbers needed to be
6 corrected.

7 Q Dr. Mayer, does Exhibit 1020 set forth any of your opinions
8 on the issue of core population retention or core district
9 retention?

10 A Yes. When I performed these calculations I submitted
11 corrected pages to my report which are set out on page 12 of my
12 expert report in the second and third full paragraphs. I noted
13 that the simple mean of the core population for each district
14 was 64.8 percent, indicating that overall less than two-thirds
15 of the core of each district had been retained.

16 By way of comparison, the 2002 Baumgart plan indicated that
17 the core retention in the district, redistricting plan there,
18 the Court noted that they had achieved a 77 percent core
19 population retention, although there is some ambiguity there
20 because it's not clear from the language of the opinion whether
21 that refers only to Assembly district or the Assembly and
22 Senate districts combined.

23 I also noted that the core population for Senate districts
24 is significantly higher at about 79 percent and that there were
25 significant differences between the core retention of

1 Democratic versus Republican districts based on the party of
2 the incumbent who was elected in 2010.

3 Q Dr. Mayer, for the Assembly and Senate districts that you
4 specifically identified before, do you have any opinions as to
5 the core population retention in those districts?

6 A It was significantly lower than it needed to be. There are
7 a number of other cases where districts that needed to shed
8 population, such as the 27th Senate district which needed to
9 lose 25,000 people because that district is in western Dane
10 County, which is an area of substantial population growth.
11 Instead of simply putting 25,000 people into another district,
12 there were many, many times as many people moved, and I can
13 look at the exact figures from my Table 3. So in Exhibit or
14 Table 3, Exhibit 3 of -- on the 27th, it needed to shed 25,541
15 people. That net population shift was achieved by adding
16 69,372 individuals, shifting nearly 95,000 people out, for a
17 net shift of 164,169, which is close to the population of the
18 Senate district, which was more than six times as many people
19 that needed to be moved in a district that simply needed to
20 lose population.

21 Q Dr. Mayer, overall, do you have an opinion as to whether
22 Act 43 adhered to traditional redistricting criterion that core
23 population of districts be retained?

24 A Yes, I do.

25 Q What is that opinion?

1 A That it did not adhere to that, not only in terms of the
2 overall average but in terms of the wild swings that occurred
3 in a number of districts.

4 Q Dr. Mayer, I'd like to move on to the second top that you
5 mentioned in the core redistricting -- I'm sorry -- in the
6 traditional redistricting criteria and that's the topic of
7 disenfranchisement. What do you mean when you use the term
8 "disenfranchisement"?

9 A Well, it's a something that happens whenever you have
10 staggered Senate elections where one-half of the districts are
11 elected in one year the other half, or in the case of Wisconsin
12 it's 16 and 17, are elected in an intervening year, that people
13 who are moved in the case of Wisconsin from an even numbered
14 Senate district or shifted from an even numbered Senate
15 district into an odd numbered Senate district, if they had not
16 been shifted they would be able to vote in the 2012 Senate
17 elections. Because they are shifted they have to wait until
18 2014 to cast their next vote in a regular Senate election.

19 Q Dr. Mayer, is it possible to avoid this disenfranchisement
20 in all instances? In other words, can you ever have a
21 situation where no one is disenfranchised as a result of
22 redistricting?

23 A You cannot.

24 Q And that's because you're moving people from one district to
25 another?

1 A Yes, and there's going to be some population movement that
2 is inevitable. To give just one example, there's a Senate
3 district in the northwest part of the state, which is the 10th
4 Senate district, which is just across the border from the
5 Twin Cities. That has a population that I believe needed to
6 lose 20,000 people, so you needed to shift 20,000 people out.
7 The only possibilities were there were three Senate districts
8 that contacted the 10th and they were all odd numbered Senate
9 districts. So there was nothing you could do. You had to move
10 people out, and so simply because of the existing structure of
11 the districts, there were 20,000 people for which there was no
12 alternative but to move them into an even numbered Senate
13 district -- or an odd numbered Senate district.

14 Q Dr. Mayer, are there limits on the number of people who can
15 or who can or should be disenfranchised?

16 A Well, it would be possible to disenfranchise as much as half
17 the population of the state if you simply renumbered all the
18 districts. So you converted all the even numbered districts to
19 odd numbered districts and all the odd to the even. So that's
20 the upper limit, but in no sense would that be justifiable and
21 as the Baumgart Court clearly stated that the number of people
22 so disenfranchised should be minimized.

23 Q Dr. Mayer, have you evaluated Act 43 from the standpoint of
24 voter disenfranchisement?

25 A Yes, I have.

1 Q What have you done?

2 A I examined the -- I believe it's Table 28.

3 Q And that's Table 28. I believe that's in the pretrial
4 report. It should also be in the binders, your Honors.

5 JUDGE WOOD: What number are we?

6 MR. POLAND: Table 28. It's in the pretrial report.
7 It should be under the tab that is labeled 28.

8 BY MR. POLAND:

9 Q Dr. Mayer, would you please explain Table 28 briefly?

10 A This is a table that shows for every odd numbered Senate
11 district the number of persons shifted into that district from
12 an even numbered district.

13 Q Dr. Mayer, if I could stop you there. I note that this is
14 only for Senate districts. Did you perform the same analysis
15 for Assembly districts?

16 A I did not.

17 Q Why not?

18 A Because the Senate, the Assembly districts don't pose the
19 same potential for disenfranchisement because every member of
20 the Senate is elected in each two-year cycle. So irrespective
21 of what Assembly district you are shifted into or out of, you
22 retain the right to vote in the next cycle.

23 Q I interrupted you as you were explaining. Please continue.

24 A This is a table that shows for each odd numbered Senate
25 district the number of people who were shifted into that

1 district from an even numbered district, thus losing their
2 right to vote in 2012. You add up the number of people so
3 disenfranchised. It reaches a total of 299,639 people.

4 Q Dr. Mayer, as a result of your work reflected in Table 28,
5 have you formulated any opinions on the topic of
6 disenfranchisement?

7 A Yes, I have.

8 Q What is your opinion?

9 A That this number is significantly higher than it could have
10 been and should have been.

11 Q Do you have any specific examples?

12 A Yes. The two instances which together make up over a third
13 and close to a quarter of -- actually almost half of the people
14 who were disenfranchised occurred in the 21st and 27th Senate
15 district. In the 21st, that population shift of 72,431 people,
16 every one of those people was moved into the 21st from the 22nd
17 Senate districts.

18 Q And again, we're talking those are the same Racine and
19 Kenosha districts that Representative Barca was testifying
20 about before?

21 A That's correct, but it shifted from a county level basis of
22 Senate representation to the Senate District 22 comprising the
23 city of Racine, extending down to the city of Kenosha and then
24 leaving the rest of two counties, shifting them to Senate
25 District 21. And that occurred because of the significant

1 reconfiguration of those districts.

2 Senate District 27 is another example where the population
3 shift into that district seems unwarranted, because as I noted
4 earlier, that was a Senate district that needed to shed 25,000
5 people. There was no need to move anybody into that district,
6 and even accepting that in the normal course of redistricting
7 that there will be some residual populations that occur because
8 of ripple effects and so forth, I can't see any justification
9 for moving 49,000 or nearly 50,000 people into that district.
10 And they came from, I believe, either Senate District 27 or
11 Senate District 14. Those two districts alone are nearly
12 122,000 people, which is 40 percent of the number of people
13 disenfranchised. If those two problems or those two particular
14 configurations were altered, the number of people
15 disenfranchised would have been in the range of 160,000.

16 Q Now, Dr. Mayer, you refer to voters who were removed from
17 Senate District 22 to 21 as being disenfranchised by Act 43;
18 correct?

19 A That's correct.

20 Q But didn't some of those voters get to vote in a recall
21 election in August 2011?

22 A Yes, the -- some of them did, that's correct.

23 Q So they didn't really lose the right to vote, did they?

24 A Well, that depends on the assumption that the right to vote
25 in a recall election is the equivalent of the right to vote in

1 a regular Senate election, and that's an argument that
2 Professor Gaddie makes and I do not find it persuasive.

3 Q Why do you not find it persuasive?

4 A Two reasons. One is that the recall elections occur in a
5 very specific political context that renders them very
6 different from regular elections. They occur or up until 2011
7 they had occurred infrequently. They are by their nature
8 unpredictable. They occur at a much shorter time frame, the
9 campaign process is compressed, and in my view the right to
10 exercise the right of recall, which is guaranteed under the
11 Wisconsin constitution, should not mean that you can deprive
12 people of another right, which is the right to vote in Senate
13 elections every four years.

14 The second reason, which actually is an extension of the
15 different context, is that in the Senate recall elections that
16 occurred in the spring and summer of 2011, this occurred in the
17 context of enormous state controversy over the budget and
18 legislation affecting the collective bargaining rights of
19 public employees and teachers. The control of the Senate was
20 very much in contest because it would have taken a net shift of
21 I believe three Senate seats to shift partisan control of the
22 Senate. Spending, according to data collected by the Wisconsin
23 Democracy Campaign concluded that somewhere in the neighborhood
24 of \$40 million had been spent on these nine elections, which
25 positively shattered previous records.

1 Even given all of that, the tremendous attention, the amount
2 of money, the stakes of these elections, turnout in the nine
3 recall elections was overall about 35 percent lower than it was
4 in 2008, even accounting for the fact that two of the senators
5 who ran in recall elections were actually unopposed in 2008.
6 So there's -- even with all the characteristics of the
7 elections, there was significantly lower turnout and
8 significantly less voter interest in the elections.

9 Q Dr. Mayer, when there are voters who move from one Senate
10 district to another, does that do anything with respect to the
11 relationship of the number of times that one voter gets to vote
12 versus another voter?

13 A Yes. If you happen to be shifted from an odd numbered
14 Senate district into an even numbered Senate district, you
15 wind up with the right to vote in two successive Senate cycles.
16 So if you were in the 21st Senate district in the city of
17 Racine and you're shifted into the 22nd, you get to vote in
18 2010 for Senate, you get to vote in 2012, and so you get an
19 extra vote in a two-year cycle that those who were shifted from
20 an even to an odd district don't get. So no matter how you do
21 it, some people are deprived of the right to vote and other
22 people get an extra vote.

23 Q Dr. Mayer, turning your attention back to the 27th Senate
24 district, how many voters were disenfranchised as a result of
25 the move into that district?

1 A 49,867.

2 Q Now, did any of those voters get to vote in the recall
3 elections?

4 A No.

5 Q And why is that?

6 A Because there was no recall in the 26th or 14th Senate
7 districts.

8 Q So even if you were to consider voting in a recall election
9 to be the same as a regular election, those 50,000 people still
10 lost their right to vote for six years?

11 A That's correct.

12 Q You mentioned some criticisms raised by Dr. Gaddie to your
13 opinions; correct?

14 A Correct.

15 Q And did Dr. Gaddie have any opinions that you reviewed and
16 you analyzed with respect to process -- with respect to
17 disenfranchisement in other states other than Wisconsin, that
18 is?

19 A Yes. In his rebuttal report Professor Gaddie produced a
20 table that compared the percentage of voters disenfranchised in
21 Wisconsin to five other states, Oregon, Missouri, Ohio,
22 Oklahoma and California. And he argued that because in that
23 ranking of states which have similarly staggered elections,
24 that the percentage of people disenfranchised in Wisconsin was
25 actually lower than the rate in four of the other five states,

1 all except for Oregon -- Oregon, not the city, the state --
2 which had a disenfranchisement rate of approximately 3 percent,
3 I believe.

4 Q And what is your opinion, Dr. Mayer, of the argument that
5 Dr. Gaddie had set forth on that point?

6 A I think those comparisons are in opposite.

7 Q Why is that?

8 A In large part because in three of the states, Missouri, Ohio
9 and California, then use radically different mechanisms for
10 conducting their redistricting. They -- California actually
11 because of a referendum no longer leaves it in the hands of
12 legislature. They have a Citizens Redistricting Commission,
13 but both Ohio and Missouri use a form of commission which is
14 either -- in the case of Ohio it's a commission, I believe,
15 headed by the secretary of state and the governor. They are
16 the group that drafts the plan, which is then submitted to the
17 legislature. And in Missouri it is similarly the plans are
18 drawn by not -- it's not necessarily an independent commission
19 but they are drawn by someone other than the legislature,
20 leaving it to the legislature for final approval. But
21 California takes that out of the legislature's hand entirely.

22 Q Dr. Mayer, did you bring with you an example of what
23 California does in the area of redistricting?

24 A Yes. I examined California's redistricting, Citizens
25 Redistricting Commission, which is produced at Exhibit 204, and

1 this is the final report that the commission produced which
2 describes its procedures, its criteria. And in particular on
3 page 25 of the report they present their analysis of the
4 effects of what they called deferred voting.

5 And I should preface this by saying that in California the
6 referendum that established the Citizens Redistricting
7 Commission established a different set of criteria that is
8 normally used. In effect, the California Redistricting
9 Commission was charged with de-gerrymandering a state
10 legislative redistricting scheme that had become egregiously
11 gerrymandered over the previous decades and they were forced
12 because of the statute or actually constitutional amendment to
13 radically reconfigure many of the districts in the state, and
14 that would necessarily, when you're forced to fundamentally
15 reconfigure districts, that's naturally going to lead to a
16 higher number of people who were disenfranchised when you have
17 staggered elections.

18 But in the middle of page 26, which is the last paragraph in
19 Section 8, numbering of districts, the commission said that
20 they did seriously consider alternative numbering systems for
21 the Senate districts, such as a simple north-to-south
22 consecutive numbering scheme, but made the determination that
23 an approach that minimized deferrals would result in the most
24 fair and effective representation for voters throughout the
25 state, which I take to mean that they chose the map which based

1 on the parameters with which they had to work which
2 disenfranchised the fewest number of voters.

3 Q Thank you. Dr. Mayer, did you also review the percentage of
4 voter disenfranchisement statewide under Act 43?

5 A Yes. It was approximately 5.24 percent.

6 Q How does that compare to voter disenfranchisement under
7 previous redistricting efforts in Wisconsin?

8 A It was significantly higher than in 2002. And it was almost
9 exactly equal to the percentage of voters disenfranchised as a
10 result of the 1992 Prosser decision in which a Court also
11 performed the redistricting process when the legislature was at
12 an impasse.

13 Q Dr. Mayer, in your opinion is the 5.24 percent
14 disenfranchisement rate under Act 43 acceptable under the
15 traditional redistricting criteria?

16 A It is not for two reasons. One is that while some
17 disenfranchisement is inevitable, there were several obvious
18 instances where the legislature, where the map drawers,
19 I should say, made decisions which had the immediate effect of
20 disenfranchising many, many people who simply didn't need to be
21 disenfranchised.

22 The other is that simply looking at the percentages take no
23 notice of fact that between 1990, which is what the 2002
24 redistricting was based on and the -- this Act 43, that the
25 population of the state had grown. And so even looking at the

1 precise equivalents in the percentages, it had the effect of
2 disenfranchising an additional, I believe, 30,000 individuals.

3 Q Dr. Mayer, do you have an overall opinion on how Act 43
4 fared with respect to the traditional redistricting criterion
5 of disenfranchisement?

6 A Yes, I do.

7 Q What is that opinion?

8 A It did not adhere to those criteria by simply not minimizing
9 the number of people who were disenfranchised.

10 Q Dr. Mayer, I'd like to move on to the final area of
11 traditional redistricting criteria that you reviewed, and that
12 is the area of municipal splits. You identified the subject
13 matter of municipal splits as a traditional redistricting
14 criteria. What are we talking about when we talk about
15 municipal splits?

16 A Well, we're talking about the criteria in which one attempts
17 to minimize the number of local jurisdictions, whether county
18 or municipality. It also applies to wards, but usually wards
19 are not split. And the idea there is that these subunits of
20 state governments, they are there for a reason. The counties
21 and cities have their own distinct political culture and
22 economic and social interests. They form a community of
23 interest, and that ought not to be split by dividing it into
24 separate Assembly or Senate districts when it's not necessary
25 to do so.

1 Q So is it prohibited, does the constitution prohibit the
2 legislature from splitting municipalities when it redistricts?

3 A I would say no, but there is a very clear admonition again
4 coming from the Baumgart Court that such splits should be
5 minimized and should only be done where necessary to achieve
6 other goals, especially equal population.

7 Q Dr. Mayer, did you review Act 43 to determine whether any
8 municipalities were split between Assembly districts or Senate
9 districts unnecessarily?

10 A I did.

11 Q And what did you find?

12 A I found that although the total number of splits of county,
13 municipality, villages and so forth was, in fact, exactly equal
14 to the total number of splits from the 1992 Court-drawn plan,
15 and in that sense it wasn't exceptional, there were several
16 instances of particular municipal splits that did not appear to
17 me to be justified on the basis of the need to achieve equal
18 population because they involve small towns, small cities that
19 could easily have been fit into a single Assembly district and
20 in one case had been in a single Assembly and Senate district,
21 as best as I can determine, for at least a hundred years and it
22 may have been as far back as the creation of the state of
23 Wisconsin.

24 Q Dr. Mayer, what municipalities are we talking about?

25 A We're talking about the city of Beloit, which was split

1 between two Assembly and Senate districts, and the city of
2 Marshfield, which was split between two Assembly and two Senate
3 districts.

4 Q Now, how about Beloit? How was Beloit split?

5 A Beloit is basically split right down the middle. Beloit had
6 population based on the 2010 census of approximately 39,000
7 people, which easily could have been fit into an Assembly
8 district. And even if it had been split into two Assembly
9 districts, there is no justification that I could see for
10 splitting it between two Senate districts. Fitting a town of
11 39,000 people into a district of 172,000 should not have been
12 an issue. And it's notable because it quite literally splits
13 the city right down the middle.

14 Q Do you know whether Beloit had been in the same Assembly
15 district for some period of time before?

16 A It had been split in the 1983 redistricting plan. It was
17 reunited by the Court-drawn plan in 1992 and had been in the
18 same Assembly district from that point until Act 43.

19 Q Were there any other municipalities that you reviewed from
20 the standpoint of municipal splits?

21 A In my view, the most inexplicable municipal split occurred
22 in the city of Marshfield, which is in the north central
23 Wisconsin. The city of Marshfield has a population in 2010 of
24 approximately 19,000 people, which was only about 5 percent
25 larger than its population in 2000. I compared -- I examined

1 using the bluebook previous redistricting configurations from
2 the 2000, nineties, eighties, and seventies, and going back to
3 the 1950's when the maps and the bluebook are no longer of
4 sufficient resolution to allow for a complete analysis of how
5 municipalities might be split, but at that point in the 1950's
6 Assembly districts in Wisconsin were apportioned on the basis
7 of counties. So an Assembly district was either an entire
8 county or a part of a county.

9 And the city of Marshfield sits on the very northern border
10 of Wood County and there are actually a couple of minor little
11 parts of the city that have grown into Marathon County, which
12 based on the pre-1960's apportionment mechanism might have put
13 it into two Assembly districts. But I obtained a map from the
14 city administrator in Marshfield that compare the city in 2012
15 to what the city looked like in 1959, which was the earliest
16 map I was able to obtain.

17 Q Dr. Mayer, is that map at Exhibit 169?

18 A Yes, it is.

19 Q And what did you -- what did you draw from Exhibit 169?

20 A Well, let me make one line here. This -- well, no, that's
21 not it. This is the line where Wood County is to the south and
22 Marathon County is to the north and the yellow area of the city
23 was the city as it looked in 1959. The gray areas of the city
24 are those that were added to the city or annexed by the city
25 between 1959 and 2012. And so I inferred from this that as

1 long as -- during the period when Wisconsin apportioned the
2 Assembly districts on a county basis, that the city of
3 Marshfield was almost certainly in the same Assembly district
4 because it's on the very northern border of a county and it had
5 been in the same Assembly districts from the 1960's through
6 Act 43.

7 And I deduced from this or concluded from this that the city
8 had been in the same Assembly districts for as long as anyone
9 can determine. The city administrator I spoke to said that he
10 believed it was at least a century and I'm not sure when the
11 city was actually founded, but I'm not sure there had ever been
12 a time before Act 43 when the municipality was split.

13 Q Dr. Mayer, how did the city of Marshfield fare under Act 43?

14 A I show the municipal split in Marshfield in Exhibit 177.
15 And again, this shows the 23rd and 29th Senate district, which
16 implies that the city is also split between two Assembly
17 districts. And you can see that the Senate District 29 reaches
18 in and carves out essentially the southeast quadrant of the
19 city, which has by my estimation probably on the order of
20 between five and 7,000 people, assuming that the -- it may
21 actually be less densely populated than that. In here the red
22 line indicates the municipal boundary and also the Assembly
23 district boundary in plans that existed prior to Act 43.

24 Q Dr. Mayer, would it have been possible to include all of
25 Marshfield in one Assembly district and a single Senate

1 district?

2 A In my view it ought to have been a trivial matter to find a
3 way to not split the city of Marshfield and find the four or
4 five or 6,000 people that apparently -- in fact, I'm not even
5 sure Senate District 29 needed to add people, but given the
6 distribution of population, this is not a densely populated
7 area, I can see to justification for this split.

8 Q Dr. Mayer, other than the constitutional preference for
9 avoiding municipal splits, is there any harm to municipalities
10 when they're split between Assembly or Senate districts?

11 A Well, as Representative Barca pointed out, when you split
12 and in the case of the county of Kenosha and the county of
13 Racine, you divide the attention of administrators or
14 legislators. So instead of having a single legislator or two
15 legislators, one in the Assembly, one in the Senate -- and the
16 city of Marshfield has some very distinct industries. It's got
17 an large healthcare and hospital and there's some paper and
18 heavy industry. You now have to deal with four legislators
19 whose attention will be divided because the city comprises a
20 much smaller fraction of their overall constituency. It also
21 imposes concrete costs on municipalities because they now have
22 to administer -- the number of elections they have to
23 administer double and the number of ballots. And in the case
24 of Marshfield I'm not sure if they had already completed their
25 ward drawing process before Act 43 was enacted, but they may

1 have had to redraw their ward boundaries, which can require
2 moving polling places. And I know from talking to the city
3 administrator that they regard this as a significant burden
4 just on the concrete cost of the administrative consequences of
5 the split just for elections.

6 Q Dr. Mayer, after reviewing the way that Act 43 splits
7 municipalities, have you reached any opinions?

8 A Yes, I have.

9 Q And what are those opinions?

10 A That at least in these two cases, and I should note in
11 reviewing the testimony of the people who drew the map, not
12 only did they offer no specific justification but they couldn't
13 even remember who made the decision. So it's not at all clear
14 why these splits existed, and I concluded that there was no
15 justification that I could see for these particular splits.

16 Q Dr. Mayer, one final question. Your testimony today, the
17 opinions that you've rendered, have you stated all those
18 opinions to a reasonable degree of scientific certainty?

19 A Yes, I have.

20 MR. POLAND: Thank you. No further questions at this
21 time.

22 JUDGE STADTMUELLER: All right. Thank you,
23 Mr. Poland. Mr. Kelly?

24

25

CROSS-EXAMINATION

BY MR. KELLY:

Q Good afternoon, Dr. Mayer.

A We shall see, I suppose.

Q Yes, we shall. I think this will be pleasant. I want to pick up a little bit on what you said about traditional redistricting principles. Obviously you and I have had an opportunity to discuss this before in deposition, and I believe you told me at that point that you considered these things, these factors to be traditional redistricting principles. You mentioned equal population, contiguity, compactness, respect for local political subdivisions, maintaining communities of interest, following federal law, preserving core district population, not shifting too much population, and to disenfranchise a minimum number of voters. Do you recall that discussion?

A I do.

Q Okay. And there was -- we also talked about how those factors interplay, because when you draw a map, if you -- if you're paying particular attention to one traditional redistricting principle, it's going to have an effect on others; isn't that true?

A That's correct.

Q Okay. So when -- when we focus on one particular area, let's say core retention, that's going to have adverse effects

1 potentially on other factors that the map drawers should take
2 into account when they're making a new legislative district
3 map.

4 A It's possible, yes.

5 Q Now, within that and putting equal population to one side
6 for a moment, because that's what redistricting is all about,
7 is getting to equal population. Let's set that aside for a
8 moment. The remaining factors that you described as
9 traditional redistricting principle, there's no agreement in
10 the -- in political science as to a ranking of those factors,
11 is there?

12 A I don't think that's correct. I think you can rank them in
13 terms of broad categories, although, for example, adherence to
14 the Voting Rights Act has got to be close to the top.

15 Q Certainly.

16 A But once you get down to things like, you know, core
17 retention and splits and so forth, I would say you're correct
18 that there's no universal agreement on how they should be
19 ranked and which ones should be considered more important than
20 the others.

21 Q Good. Well, let's go with that. We'll say -- we'll take
22 equal population and we'll take compliance with the Voting
23 Rights Act and we'll say those two, they -- they're definitely
24 at the top of the list, and then the factors below that,
25 there's no recognized agreement in the hierarchy that they

1 have.

2 A I would say that's largely correct.

3 Q Okay. Now, Dr. Mayer, I think we talked about this in the
4 deposition. You didn't actually draw a map for the entire
5 state of Wisconsin that would incorporate all of the principles
6 that Mr. Poland has spent so much careful time going over with
7 you.

8 A That's correct.

9 Q So you don't really know how a complete map would look
10 trying to account for all of those competing interests in
11 redistricting.

12 A Well, in some cases I could. To take two examples, the
13 configuration, the collective configuration of the Senate
14 Districts 21 and 22 didn't change at all. It was simply
15 reconfigured within an existing boundary which had no ripple
16 effects. So although I did not examine every district to see
17 whether it was possible to reconfigure it, although there are
18 virtually an infinite number of ways that a particular map can
19 be configured, I was able to make some determinations.

20 Another example is how Assembly Districts 8 and 9 were
21 reconfigured, that the orientation of those districts changed
22 because of an amendment to the redistricting plan which changed
23 them from a north-south orientation to the -- I'm sorry, the
24 east, the 8th on the top and the 9th on the bottom to the 9th
25 on the west and the 8th on the east.

1 So although you're correct that having not drawn a
2 comprehensive map for the state, I don't believe that means
3 that I'm unable to render an opinion on the parts of the state
4 that I looked at.

5 Q Well, let's take a look at that a little bit further, and
6 you mentioned Senate Districts 21 and 22, Assembly Districts 8
7 and 9, and those just seemed to be a reorientation of the
8 districts within essentially the same boundaries.

9 A That's correct.

10 Q All right, but with the -- with respect to the rest of the
11 communities and factors that you looked at around the state,
12 you've not taken a holistic look at that. You've looked at
13 individual spots. Yes?

14 A That's correct.

15 Q All right. And we know that making certain decisions in one
16 part of a map are going to have branching consequences
17 I believe is the term that you used.

18 A That's correct, but there's going to be limits to that, that
19 a decision that you make in the, for example, the southwest
20 corner of the state, while it may have ripple effects in that
21 area, you wouldn't expect to see those effects carrying through
22 large distances to the far north and the far northeast and
23 so forth. So there are limits to that, and --

24 Q Well, let me stop you right there for a moment.

25 MR. EARLE: Your Honor, we have an interruption.

1 I think the deponent should be allowed to finish his answer.
2 Is that okay?

3 JUDGE STADTMUELLER: I understood him to have
4 finished but if you haven't, Dr. Mayer --

5 THE WITNESS: I actually lost my train of thought.
6 I'm sorry.

7 BY MR. KELLY:

8 Q Well, I am sorry. All right. Perhaps you'll pick it up as
9 I ask the next question.

10 A Oh, I remember. Can I elaborate?

11 Q Certainly.

12 A In the areas that I looked at these were not areas of the
13 state where one saw dramatic growth and these were areas that
14 had previously been encompassed in a single Assembly district,
15 and I deduced from examining those areas that I don't think it
16 would have been a difficult problem to reconfigure the
17 districts in those areas. Yes, you may have lost something
18 with compactness. You may have lost not necessarily core
19 retention but I think that those particular problems were
20 eminently solvable.

21 Q And certainly if you looked at that isolated event, then if
22 it should be the map drawers' decision to address the factors
23 that you chose to focus on, it probably wouldn't be that hard,
24 but the map drawers for Acts 43 and 44, they didn't have that
25 luxury, did they? They had to draw an entire state map.

1 A That's true, but as I understand the process, the way that
2 it worked is that each of the map drawers took a region of the
3 state. So I'm not even sure if it's correct to say that the
4 map drawers themselves drew a comprehensive map. They divided
5 the state up into regions and then matched them up.

6 Q And when you divide them up into regions, the decisions you
7 make on where to start, what factors to concentrate on, those
8 are going to affect the decisions that are made later in
9 working the rest of the way through that region. Wouldn't that
10 make sense?

11 A Well, there's also a process point that the boundaries of
12 the regions you choose to focus on are going to have a
13 significant effect on how the districts look within that
14 region, and again I'm not aware of the specific boundaries that
15 are used, but if you attempted to draw Senate districts in one
16 quadrant or one-third of the state with the expectation that
17 there would be minimal or no spillover into other areas, that
18 would significantly affect the decisions that you made within
19 that region which you might not have had to make had you
20 started in one spot and continued through to the rest of the
21 state.

22 Q All right. But in point of fact with respect to this map,
23 you don't -- you can't really say because you didn't go through
24 that exercise.

25 A Well, I believe I can make an inference about the

1 consequences of dividing it up by region, although you're
2 correct, I did not go through the process of drawing a
3 statewide map.

4 Q And you -- we discussed this before, you said that, that the
5 effect of these different redistricting principles on each
6 other is cumulative. For instance, you said I would say that
7 the effect is cumulative, that if you start drawing a map in
8 this place, you'll make certain decisions because you will stop
9 and conclude that you've achieved a proper population or
10 sufficient population that's within your goals for achieving
11 population equality, and then you start the drawing the next
12 districts and the next district off of that, and the decisions
13 you make early in the process are going to affect what happens
14 throughout the process; right?

15 A That's correct.

16 Q Okay. And then I asked you is that the case here, small
17 changes made in the beginning can affect major changes later
18 on. Do you recall that you answered, well, certainly as a
19 conceptual basis they can. That's true, isn't it?

20 A Sounds correct.

21 Q As you continued your answer, you said it's very clear to me
22 that at virtually every stage of the process you have, the
23 decisions will branch. You can decided to go off in one
24 direction and go off into another and maybe four or five
25 different decisions and those decisions will have an impact on

1 what happens later on in the process. And that's all true,
2 isn't it?

3 A That's correct, although I should say that the branching
4 decisions that occur later on down the road, those are not
5 fixed. You can make different decisions at every point in
6 process based on which branch of the process you wish to go
7 down.

8 Q And in fact, the decision also you can make are nearly
9 infinity.

10 A That's correct.

11 Q Now, you do understand, Dr. Mayer, that it is first and
12 foremost, as the Court has reminded us several times since the
13 beginning of the case, the legislature's responsibility and
14 purview and privilege to make those decisions?

15 A I would say it's the legislature's constitutional power to
16 make that decision.

17 Q And they, therefore, then have the right to make those
18 decisions.

19 A I suppose that's correct.

20 Q Let's talk about some of the specific traditional
21 redistricting principles that you went through with Mr. Poland.
22 I'd like to start with compactness. Now, could we take a look
23 at Exhibit 1021?

24 MR. POLAND: Your Honor, if I could object, we did
25 not go over compactness. Dr. Mayer's not expressed any

1 opinions on compactness.

2 MR. KELLY: Then we can skip that. Thank you,
3 Mr. Poland.

4 BY MR. KELLY:

5 Q And similarly, I don't believe that you've expressed any
6 opinion on whether the population of the districts exceeds any
7 boundaries?

8 A That's correct.

9 Q So you have no problem with equal -- the allocation of
10 population in the districts?

11 A That's correct. In terms of the numbers, I should qualify
12 that.

13 Q We'll talk about the other aspects shortly.

14 A Okay.

15 Q All right. So let's talk about population movement, and
16 that's closely related to the concept of the core retention,
17 isn't it?

18 A That's correct.

19 Q And, in fact, it's nearly two sides of the same coin.

20 A Yes, that's true.

21 Q Okay. And that's one of those concepts, you identified
22 those as being part of the traditional redistricting
23 principles.

24 A Correct.

25 Q And those are in the classification where there's no

1 agreement in political science about how those relate to each
2 other in a hierarchy.

3 A Well, again, I don't think that you can specifically rank
4 order them, but I think there is an agreement that some are in
5 a conceptual sense more significant than others. So I would
6 place core district retention as one of the more important
7 ones, although it's not possible to specifically rank them or
8 identify how much more important.

9 Q Well, let's see if we can make it -- let's call it a break
10 point in how we organize these. Equal population, that the --
11 there's a legal context to that; right? You have to get to a
12 certain amount of equal population and deviation beyond that is
13 unacceptable; right? There's a legal line.

14 A Generally that's true, although the definition of what's
15 acceptable can differ depending on the nature of the context,
16 but as a general principle I agree with that.

17 Q So it's kind of a fuzzy line but there's a line.

18 A For legislative districts it's a little fuzzier than it is
19 for congressional districts.

20 Q Sure. Compliance with the Voting Rights Act, mandatory, you
21 have to do that; right?

22 A That's correct, when it's applicable.

23 Q Okay. Core retention, population movement, that we don't
24 find in the constitution?

25 A That's correct.

1 Q We don't find it in the statutes.

2 A That's correct, but you do find it the jurisprudence which
3 fleshes out those requirements.

4 Q And we can talk a little bit more about that later. I'm
5 wondering -- well, maybe we'll talk about it now. I'm
6 wondering, do you know if the jurisprudence talks about those
7 principles in terms of you have a mandatory duty to minimize
8 population movement or does it speak of it in terms of
9 analyzing whether a constitutional or statutory requirement has
10 been violated? Do you know?

11 A I don't believe there's any set threshold which triggers a
12 finding that there's a violation. It's a more conceptual
13 question.

14 Q But what I'm wondering is whether you know if the courts
15 talk about these traditional redistricting principles in terms
16 of assessing whether a separate constitutional or statutory
17 requirement has been violated, like equal population or Voting
18 Rights Act?

19 A It can enter into a finding of racial gerrymandering or the
20 appropriateness of drawing an majority/minority district in a
21 particular configuration, so they're not hermetically sealed.

22 Q And certainly the courts consider those when they're talking
23 about constitution or statutory requirement.

24 A That's correct.

25 Q Okay. Now, in your report, Dr. Mayer, you mention that the

1 enacted plan shifted more than three and a half million
2 individuals around from one district to another. Do you recall
3 that?

4 A That's correct.

5 Q Now, that was a combination of numbers, wasn't it? It was
6 additive. You added people moved out of Senate districts and
7 people moved out of Assembly districts.

8 A That's correct.

9 Q Now, isn't it true -- well, let's start with a little bit of
10 political science here. In Wisconsin Senate districts are
11 composed entirely of three Assembly districts; is that correct?

12 A That's correct.

13 Q So there's a standard reason that if you're moved out of a
14 Senate district, you'll probably be moved out of an Assembly
15 district as well.

16 A Not probably. By definition.

17 Q Okay. So wouldn't it be more appropriate to simply look at
18 the Assembly numbers to see how many people got moved from
19 district to district, because otherwise we're adding in a
20 1.2 million number that's additive, isn't it?

21 A Well, but they're -- they involve different sets of
22 decisions that -- that although the movement in one area
23 implies a movement in another, I think it's appropriate to
24 appropriate to look at both of them.

25 Q But then we have let's take for example Joe Smith, and he

1 lives in Senate District 1, Assembly District 1, and after
2 redistricting he lives in Assembly District 2,
3 Senate District 2. Now, he's going to have been counted as two
4 people being moved, wouldn't he?

5 A Well, I don't mean to be argumentative but that particular
6 hypothetical is not possible because the movement from Assembly
7 District 1 to 2 would not involve moving from a Senate
8 district. You would have to move from 3 to 4. So there's a
9 limit to --

10 Q It was an ill-constructed hypothetical, but the truth is
11 that one person moving from both a Senate and Assembly district
12 would be counted twice for your three and a half million
13 number.

14 A That's correct.

15 Q So we don't really know the three and a half million people
16 got moved from one district to another.

17 A Well, they did. It's just -- I don't know if it's anything
18 more than a semantic point, but the people who were moved from
19 one Senate district to another are by definition moved from one
20 Assembly district to another.

21 Q Right, so we don't want to count them twice. We want to get
22 an accurate number; right?

23 A I suppose you could. There are different ways of doing
24 that. I'd have to think about it.

25 Q Well, you didn't think about it before you did the report

1 and gave that number.

2 A Not in this context, that's correct.

3 Q Okay. Now, Dr. Mayer, I'm a little curious about some of
4 your comments with respect to core retention, and you talked
5 about the necessity of moving people, and I'd like to explore
6 that with you a little bit, if I could. And you gave several
7 examples where you said you could see no justification for the
8 movement. Do you recall saying that?

9 A That's correct.

10 Q And I think you mentioned Senate Districts 2, 17, 21 and 22?

11 A In the context of the number of people who were shifted
12 compared to the number of people who had to be moved in order
13 to achieve population equality.

14 Q Had to be moved, that's what I want to pick up on.

15 All right. So we start out trying to equalize population,
16 right, and we start in a district which is underpopulated and
17 if we look at it and we see that it's surrounded by areas that
18 are also underpopulated, that's going to -- that's going to
19 require more movement cumulatively than if you were to simply
20 take the over or under number for that one district, won't it?

21 A I guess I would agree with the first part of the question.
22 I'm not sure that the second part necessarily follows.

23 Q All right. Let's --

24 A Because if you had a series of underpopulated districts that
25 were, for example, bounded by, you know, formed a perimeter

1 that was bounded by the state border and they all had to grow,
2 they all would have to move out in some sense to pick up
3 additional population. But that doesn't necessarily require
4 large shifts into and out of each district.

5 Q Let's take a look at that more and just for the sake of
6 simplicity in numbers let's say that we have two districts next
7 to each other and District number 1 is underpopulated. So a
8 hundred people live in the district and let's say a hundred ten
9 is what you need to get to; right? So we look at District 1
10 and we say, well, the necessary number of people to move into
11 that district is ten; right?

12 A Correct.

13 Q And that's how you'd score it. You'd say it's ten.

14 A If the goal was absolute population equality, that's
15 correct.

16 Q So next door is District number 2, also has a hundred people
17 in it and also has to pick up ten people. All right? So now
18 District 1 takes ten people from District 2 to get to its 110.
19 Now District 2, now they're 20 short, aren't they?

20 A Well, but that's an incomplete hypothetical because you're
21 almost never faced with a situation where you only have two
22 districts to work with. You will almost always, unless you're
23 dealing with the first Assembly district which is on the
24 northern tip of Door County which only has one place to go and
25 that's down, you will typically have many more than a single

1 option.

2 Q Sure, and I made the hypothetical simple just to get the
3 point across but we can make it a little more complex. We can
4 say that it surrounds it all around with other districts that
5 are also short on population; right? Not an unusual situation.

6 A Depending on where you are, that's possible.

7 Q We actually saw that in Milwaukee County, didn't we?

8 A That's correct.

9 Q So districts that are short on population?

10 A I would say more in the city of Milwaukee rather than the
11 county.

12 Q So we've got districts that are low in population surrounded
13 by districts that are low in population and whether you pick
14 from the one to the north or the south or the west, they're
15 going to come up more short than they were before.

16 A That's true, but that wouldn't be a justification for moving
17 people out of one district and then moving people back into
18 that district. So it might trigger a cascading series of -- as
19 each district has to grow, but what we observed is significant
20 shift into and out of districts irrespective of how many people
21 they needed to shrink by or grow by. So --

22 Q Well, let's put the analysis in slow motion a little bit so
23 we can keep track of what we're doing. So we start off first
24 with the understanding that simply because a district is ten
25 people under doesn't necessarily mean that only ten people need

1 to be moved to make it equal. Right?

2 A That could very well be true.

3 Q Okay. Because it has that cascading effect that you talked
4 about.

5 A Well, I'm not sure that the cascading effect would by itself
6 involve moving people out of -- into that district and moving
7 people out. I was thinking of the cascading effect as the
8 interior districts, district expanding a little bit and then
9 the districts around there would have to expand and then -- but
10 that wouldn't necessarily explain why people were moving, you
11 know, back and forth between underpopulated districts.

12 Q Good. All right. So part one is we know that you can't
13 just look at a district and see it shows as being ten people
14 under so the necessary number of people to move is ten. We
15 know we can't look at it that way; right?

16 A I'm not sure I would agree with that, that that may not be
17 the only thing that you look at because there are other
18 considerations. But I believe that the calculation I did of
19 the ratio of people who were actually moved divided by the
20 people who needed to be moved is a meaningful number and it's
21 one thing to have a handful of districts where that number is
22 large. It's another thing to have the overall numbers
23 extremely large, which suggests significant reconfiguration of
24 every district that wouldn't necessarily be required in order
25 to achieve population equality.

1 Q All right. It's that necessary part that we've got to tease
2 out. You acknowledge that simply looking at the number of
3 people in a district, any given district is over or under does
4 not necessarily represent the number of people that would be --
5 would be necessary to move in and out or get to the population
6 equality because there is this cascade effect changing district
7 boundaries around them will affect how many people you have to
8 move to get the population equality in that district.

9 A Well, I would say that the number by itself isn't the full
10 picture, but if that number, I would say that it -- that number
11 is not meaningless in terms of reaching an inference about the
12 appropriateness or arbitrariness of the number of people who
13 were moved. So I would agree that it's not the only number
14 that you need to look at but it's more than telling you
15 nothing.

16 Q Sure. Well, let's look at it this way then. You -- you
17 didn't write a statewide map that would move what you would
18 calculate as being the least number necessary to move.

19 A That's correct.

20 Q And if you did draw a map like that, you'd be sacrificing
21 other redistricting principles.

22 A If I took the effort to do it, I suspect that I might have
23 had to make some decisions, but I'm quite confident I could
24 have drawn a statewide map that shifted far fewer people.

25 Q You're quite confident about that having never done it.

1 A Well, based on what I know about redistricting and my
2 experience with maps, you know, it's not necessary to have done
3 it or make an inference about what's possible and what's not
4 possible.

5 Q Well, let's think about that. Do you know how long it took
6 to develop the map that became Act 43?

7 A I know that it took months and several people. So it's not
8 a trivial process, that's true.

9 Q So you've not engaged in that non-trivial process to see if
10 you could draw a map that does nothing but move the least
11 necessary, the fewest people necessary as you calculate it.

12 A That's correct. But there are some models which -- from
13 Baumgart in 1992. So it's not as if I'm, you know, punching
14 wildly in the dark.

15 Q Well, certainly, and I think you make a good point there.
16 You could maybe draw a map that has less than this but you
17 don't know what effect that's going to have on other of the
18 redistricting principles that you said the legislature needs to
19 keep in mind.

20 A Not with certainty, that's correct.

21 Q Okay. Not with certainty. Thank you. When you talked
22 about some of the -- some of the movements in the districts
23 that you had concern about, you said you had the impression
24 that there was no justification for the movement. Do you
25 recall that?

1 A That's correct.

2 Q All right. What about the legislature's impression of what
3 was good for the people of state of Wisconsin?

4 A Well, the notion that one can divine specific intent on
5 specific decisions from the collective action of the
6 legislature is not what I looked at. I examined the record,
7 the testimony, depositions, reports that the people who drew
8 the maps said were their justifications, and in examining that
9 record -- and the legislature can only act based on that --
10 based on alternatives that are presented to it. So the notion
11 that this legislature makes this decision out of ether is
12 demonstrably incorrect, that the legislature can only act on
13 what is presented to it.

14 And so I don't think that falling back on the collective
15 wisdom of the legislature exhausts the process of trying to
16 figure out the justification for specific the decisions. And
17 when one looks at the evidentiary record of the people who say
18 they drew the map, they don't offer as a general statement of
19 equal population and concern for minority interests, but when
20 it came to specific decisions why did you do this, why did you
21 do that, no answer and in many cases there was no recollection
22 of who had actually made the decision. So that's what I base
23 that on.

24 Q And you recall, I'm sure, the testimony that that showed
25 that those maps were presented to the legislature for their

1 consideration.

2 A Well, that's -- in a formal sense, yes, there was a map that
3 was presented to the legislature which went through a minor
4 modification, amendment process which was subsequently adopted.
5 So you know, in a formal sense, yes, that counts as legislative
6 action.

7 Q Well, and the legislature could have rejected the map that
8 was brought to it, couldn't it?

9 A In theory that's correct.

10 Q Well, it's more than theory. They vote on it.

11 A Well, when you look at the real world configuration that the
12 legislature found itself, I think it's highly unlikely that
13 when presented with a single alternative that that was a --
14 that was a plausible scenario that the legislature would reject
15 the map.

16 Q All right. Now, you understand that the maps are not drawn
17 by 99 assemblymen and 33 senators getting together in a room
18 that are pushing buttons on a computer; right?

19 A That's correct.

20 Q There's always going to be somebody, some small group of
21 people who are going to draft the map.

22 A That's correct.

23 Q And the legislature gives direction on what they ought to be
24 doing.

25 A Well, in this case again by the testimony of Mr. Ottman,

1 Mr. Foltz and Mr. Handrick, they were very vague about what
2 specific direction they got about who directed them or what
3 input they received from legislators in drawing the maps. So
4 I think it's incorrect to characterize this as a collective
5 deliberation of the Senate or Assembly Republican caucus
6 deliberating at length on the map configuration. That's not
7 what happened.

8 Q Well, they told their agents to draft a map. They drafted
9 the map. Brought it back to the legislature. The legislature
10 looked at it and apparently their judgment was well done;
11 right? They voted for it.

12 A Well, they voted to approve the map, they did.

13 JUDGE STADTMUELLER: Mr. Kelly, I think that brings
14 us to the end of today's trial session. I would invite you and
15 your colleagues to caucus and let Mr. Willenbrink know before
16 you depart this afternoon how much time you collectively
17 believe will be needed to complete this case tomorrow, keeping
18 in mind that we are going into whatever amount of time it takes
19 in the evening. And the only reason that the Court needs to
20 know that tonight is we need to make appropriate arrangements
21 for access to the building as well as security and the
22 utilities. So please confer with your colleagues and the
23 plaintiffs' counsel and let Mr. Willenbrink know before you
24 leave tonight how much time you believe will be necessary to
25 complete the case, including any arguments that counsel wish to

1 make.

2 MR. KELLY: Very good. Thank you.

3 MR. POLAND: Your Honor, if I could ask for just
4 clarification, in terms of closing argument, I would be
5 interested in knowing what your Honors would expect in terms
6 of -- I would like some guidance on that.

7 JUDGE STADTMUELLER: Well, we can start with how many
8 white flags of surrender are going to be raised on some of the
9 claims so that we are all on the same page as to what the Court
10 needs to decide, including claim nine. I'm not sure based upon
11 the pleadings, based upon the testimony, based upon the
12 pendency if a bill in the legislature to make Act 43 applicable
13 to these recall elections as well as the litigation pending in
14 Waukesha County Circuit Court, what impact any of this has with
15 respect to either our ability to render an opinion as to that
16 matter, because it certainly ill-behooves the Court to tell the
17 legislature what it can and cannot legislate, any more than we
18 can tell the state Court what it can and cannot adjudicate
19 under state law. So that's just one little vignette in all of
20 this.

21 So I would simply suggest that you gather your
22 collective resources and just give us some guidance as to what
23 you believe is appropriate and put your arms around it, whether
24 in Summation or Power Point presentation or a list of the
25 exhibits, a list of the depositions, and frankly, that's why we

1 wanted these proposed findings of fact and conclusions of law,
2 of which there are hundreds, no question about it.

3 And I appreciate all that you have tried to pull
4 together, but as we go forward, just listening to today's
5 testimony, it is becoming more evident that a lot of these
6 proposals simply are not going to find their way into an
7 ultimate opinion because they're not relevant. So that's the
8 first question that you need to come to grips with so the Court
9 can discharge its responsibility and be guided. I put no
10 limits on how long anybody can argue. The only limit is we're
11 going to finish tomorrow, whether it's at 6:00 o'clock or
12 10:00 o'clock or 12:30 on Saturday morning, and the only other
13 limit is after we conclude tomorrow, there will be no more
14 briefing, no more proposed findings, no more conclusions of
15 law. This case was front end loaded given the compression of
16 time and we're going to stay with that time schedule,
17 particularly against the backdrop of the impending April 15th
18 deadline for nomination papers.

19 And we've tried in every order that this Court has
20 issued to be incredibly timely responsive. This case has taken
21 an equal amount of time for these three judges as it has for
22 each of you, and we want to deliver on our promise not only to
23 counsel but to the citizens of Wisconsin.

24 MR. POLAND: Thank you, your Honor.

25 JUDGE STADTMUELLER: The Court stands in recess.

1 THE BAILIFF: All rise.

2 (Proceedings concluded for the day at 6:03 p.m.)

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN
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4 I, MICHELLE HAGEN, RPR, Official Court Reporter for the
5 United States District Court, Eastern District of Wisconsin, do
6 hereby certify that I reported the foregoing proceedings, and
7 that the same is true and correct in accordance with my
8 original machine shorthand notes taken at said time and place.
9

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11 Dated this 23rd day of February, 2012,
12 Milwaukee, Wisconsin
13

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15 _____
16 Michelle Hagen
17 Official Court Reporter
18 United States District Court
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